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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

No. ~~1065~~ 171

HUGH BRYSON,
*Petitioner,*
vs.
UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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No.

HUGH BRYSON,
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## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 30, 1956.

### CITATION TO OPINIONS BELOW.

The opinion of Judge Murphy, denying petitioner's motions to dismiss the first[1] indictment brought against him,

[1] There were *three* indictments returned against petitioner before he was finally brought to trial.

to compel an election between the "membership" and "affiliation" counts of the indictment, and for a bill of particulars, is reported at 16 F.R.D. 477; the opinion of Judge Carter denying similar motions directed to the second indictment is reported at 16 F.R.D. 450; the opinion of Judge Goodman dismissing, on the Government's motion, both these indictments after the Government had filed a third indictment in the District of Columbia, is reported at 16 F.R.D. 453; the opinion of Judge Murphy vacating an order entered by Judge Morris in the District of Columbia proceeding granting petitioner's motion for a bill of particulars, is reported at 16 F.R.D. 431. All of the foregoing opinions and orders are set forth in the Appendix hereto. Other orders and opinions of the trial court are to be found in the Clerk's Record on Appeal herein.

The opinion of one panel of the court below granting bail to petitioner pending his appeal is reported at 238 F.2d 775;[2] the opinion of another panel of the court below which affirmed the conviction is reported at 238 F.2d 657; its opinion upon a denial of a petition for rehearing is not yet reported.[3] All of the opinions of the court below are printed in the Appendix hereto.

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[2]This panel consisted of Chief Judge Denman, and Circuit Judges Bone and Orr. This was the only time that any member of the Court of Appeals wrote on any issue of this case. Cf. n. 3, *infra*.

[3]The affirming panel consisted of two District Judges and one Circuit Judge. The opinion was written by one of the District Judges. This, like *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 197 F.2d 994, 1013 (9 Cir., 1952), is a case in which "no member of the Court of Appeals has written a line on the merits." Cf. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 263 264.

## JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 30, 1956 (238 F.2d 657; App. 29, 50). A timely petition for rehearing was denied on April 12, 1957 (..... F.2d .....; App. 45, 51). On May 3, 1957, Mr. Justice Douglas entered an order extending until June 7, 1957, the time within which petitioner might file this petition. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

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## QUESTIONS PRESENTED.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the Northern District of California, entered on a jury verdict finding petitioner guilty on one count of a two-count indictment which charged him with making a false statement in an affidavit filed with the National Labor Relations Board. The alleged false statement was that in April of 1951 petitioner was not "affiliated" with the Communist Party.[1]

The questions presented are:

1. Whether the term "affiliation" as used in Section 9(h) of the Taft-Hartley law was unconstitutionally applied to petitioner in that—

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[1]The jury acquitted petitioner of the charge that he had falsely denied membership in the Party (R. 1182). Prior to trial the Government had voluntarily dismissed a third count charging that petitioner had falsely denied "support" of the Party.

"R" refers to the Reporter's transcript of testimony, three copies of which, in typewritten form, were filed with the Clerk of the court below, pursuant to permission to prosecute the appeal on such a record.

(a) neither the affidavit nor the indictment advised petitioner with reasonable certainty of the meaning of the term, contrary to the requirements of the Fifth Amendment;

(b) neither the affidavit nor the indictment warned petitioner that this Court's interpretation of the term in *American Communications Association v. Douds*, 339 U.S. 382, was not regarded by the Government as binding;

(c) neither the proof nor the charge complied with the requirements set forth in *American Communications Association v. Douds, supra.*

2. Whether the trial court's instruction on "affiliation"—

(a) defined the term in a manner contrary to this Court's decision in *Bridges v. Wixon*, 326 U.S. 135;

(b) failed to provide the jury with any legal standards by which to determine what was meant by the term;

(c) permitted the jury to convict petitioner solely upon the basis of activities protected by the First Amendment.

3. Whether the conviction is supported by proper and competent evidence.

4. Whether prejudicial hearsay testimony respecting Communist Party "policy" was received against petitioner, contrary to the rules of evidence and prior decisions of this Court.

5. Whether the perjury rule is applicable to a prosecution for false swearing under 18 U.S.C.A. 1001, and if so, whether it was complied with here.

6. Whether the petitioner had a right to interview members of the jury after the verdict in order to de-

termine whether extraneous influences affected their understanding of the term "affiliation" and thereby unlawfully influenced the verdict.

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## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

**Statutes Involved.**

Section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C.A. 159[h]) which provides for the filing of the affidavit in question reads, in relevant part, as follows:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization * * *, and no complaint shall be issued pursuant to a charge made by a labor organization * * *, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35(A) of the Criminal Code shall be applicable in respect to such affidavits."

18 U.S.C.A. 1001, which superseded Section 35(A) of the Criminal Code,[3] reads:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by

[3] See 29 U.S.C.A. 159, *Historical Note*.

any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

**Constitutional Provisions Involved.**

The First, Fifth and Sixth Amendments to the Constitution of the United States, upon which petitioner relies, read as follows:

"Amendment 1: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Amendment 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

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## STATEMENT OF THE CASE.

On April 21, 1951, petitioner executed the affidavit required by the Board pursuant to Section 9(h). This affidavit, on the printed form provided by the Board, was filed in Washington, D. C., on April 26, 1951, and became the basis for the proceedings here.

The first and second indictments, each in two counts, charged that the affidavit contained two false representations: that he was not a member of, and that he was not "affiliated" with, the Communist Party. The filing of two separate indictments resulted from the existence of problems relating to venue jurisdiction. Cf. *United States v. Valenti*, 207 F.2d 242 (3 Cir.). Motions to dismiss these indictments, to compel an election between the two counts,* and for a bill of particulars, were denied by the trial court (16 F.R.D. 450, 478; App. 1, 3).

Thereafter, the Government filed a third indictment in Washington, D. C., later obtaining leave to dismiss both

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*The prejudice resulting to petitioner from the denial of the motion to compel an election, which was addressed to all three indictments and renewed during the trial (R. 1085-G; 1085-DDD), became apparent with the verdict of acquittal on the first count. For, if the Government had been compelled to proceed on the "membership" count alone, the acquittal would have ended the case. On the other hand, if it had chosen to proceed on the "affiliation" count, much of the evidence it offered would not have been relevant. Indeed, the Government adduced no evidence specifically directed to that count alone.

California indictments (16 F.R.D. 453; App. 7). The Washington indictment, unlike its predecessors, was in three counts. The first and second dealt with "membership" and "affiliation", while the third alleged that the affidavit contained yet another false statement: that Bryson did not "support" an organization that believed in or taught the overthrow of the United States Government by force.[2]

A motion to dismiss the last indictment was denied, but motions for a list of Government witnesses, for discovery and inspection before trial, for the production of certain documentary evidence, and for a bill of particulars were granted (App. 9-11). Certain admissions relating to the authenticity and mailing of the affidavit were made by petitioner (R. 29-30) and certain stipulations were entered into between counsel respecting the venue issue; an order was thereafter made transferring the proceedings from Washington, D. C., to San Francisco. At the time of the transfer the Government had not furnished the bill or made discovery. Instead of so doing, it obtained an order in California vacating the Washington order (16 F.R.D. 431; App. 12-22). Petitioner thereupon sought unsuccessfully to be relieved of the admissions and stipulations entered into in Washington, D. C. After the decision in *United States v. Lattimore*, 127 F.Supp. 405 (D.C. D.C.), a supplemental motion to dismiss the third ("support") count of the indictment was filed; before a ruling the Government on its own motion dismissed this count. The case

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[2] Venue in the District of Columbia was based upon the allegation that Bryson did "use and file, or cause to be used and filed" the affidavit "with the * * * Board in the City of Washington, District of Columbia."

ultimately went to jury trial only on the "membership" and "affiliation" counts.

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The Government, of course, was required to prove that petitioner was a "member" of, or "affiliated" with the Communist Party in April of 1951, when the affidavit was executed and filed. To sustain this burden the Government offered evidence, without discrimination between the two counts, that between 1937 and 1947 petitioner, as the court below put it, "attended many Communist Party meetings."[8] He solicited new members and participated in the expulsion of old ones. He was a member of the county and state committes of the Party. He acted as chairman of some meetings and gave 'educational' talks at others.[9] In one of these talks to new members he stated 'When you are in the Communist Party you accept discipline. You ask no

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[8]Cf. the following from Judge Pope's concurring opinion in *Bridges v. Wixon*, 199 F.2d 811, 836 (9 Cir.), reversed on other grounds, 346 U.S. 209: "The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at which every other person present was a Party member." The record in the case at bar shows the attendance of non-members at "Party meetings" (R. 55; 307-308; 319).

[9]The content of such talks is not revealed by the record. (See R. 196-197.) Insofar as petitioner is reported to have said anything at any of these meetings, the record reveals that once, in 1941 or 1942, he spoke on "a current economic issue that was a hot issue on the waterfront"; once, in the same period, on the need for a second front in Europe (R. 392-393); and once, in 1947, on the Taft-Hartley law (R. 497). Nothing in the record shows that Bryson ever spoke of, much less taught or advocated, any proscribed doctrine, or even that he ever spoke of, or attended meetings where others spoke of, Marxism-Leninism.

questions . . . for the good of the Party you carry out any order that is given to you from the top fraction and you ask no questions'."[10] (235 F.2d 659; App. 30).

Most of this evidence dealt with the years 1937 to 1941; none of it dealt with any period later than 1947—four years prior to the time petitioner signed the affidavit.[11] There was no testimony of any Communist activity whatsoever during the period between 1947 and 1951 when the affidavit was executed.[12] The court below itself remarked on the "absence of evidence of Bryson's active participation in Party functions after 1947" (235 F.2d 661; App. 35).

Finally, there was testimony that, three months after the affidavit was signed, petitioner said either he was proud to be a member of the Party (R. 557), or he was proud that one had to be a member to get an assignment slip to a job (R. 648), or that he was "still a Communist and proud of it" (R. 697). These alleged statements[13]

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[10]This particular "talk" occurred in the summer of 1937 (R. 60-64).

[11]There was testimony that at a meeting in 1947 the "trade union director of the Communist Party . . . announced that it would be Party policy for Party members in labor unions to boycott the Taft-Hartley Act . . . but [if necessary] they would resign from the Party in name only but remain in close touch and allegiance with the Party." Petitioner is alleged to have said "in reply" that he saw no need to comply then but might have to do so in the future (238 F.2d 660-661; App. 31).

[12]There was testimony that in 1948 Bryson had urged a witness "to go to Georgia and get signatures for the Progressive Party", and that in 1949 he had an argument with a union member who had, some years earlier, passed up an opportunity to join the Party (238 F.2d 660; App. 32).

[13]However, it was the witnesses, not petitioner, who used the words "Communist" and "party" (R. 567, 595, 648); they "assumed" that petitioner meant the same thing that they did (R.

were said to have been made, shortly after the signing of the affidavit, to three bitter enemies at a time when they were organizing a rival union (R. 932-941).

At the conclusion of the Government's case, a motion for judgment of acquittal was made (R. 719-F) and denied (R. 719-HHHH).

In his defense, Bryson called some sixteen witnesses, many of whom directly contradicted prosecution witnesses, on specific items of testimony.[14] In addition, defense testimony established the depth of the animosity which several prosecution witnesses harbored against Bryson.[15] Defense

585). On two prior occasions when these witnesses gave testimony about these conversations they totally failed to mention the so-called admissions (R. 562-567; 600).

[14]A defense witness (R. 887-895) established Bryson's absence from San Francisco at a time in 1937 when the Government claimed he had attended Party meetings in that city. Another defense witness (R. 909-910), himself a former Party member who attended the Party meetings at which a Government witness had placed Bryson in 1937, denied that Bryson was present. The Government witness was further impeached by the defense (R. 851). Another defense witness (R. 828-843) introduced records to show that Bryson was in Washington on union business in 1946 at a time when a Government witness quoted him as making "pro-Communist statements" in San Francisco. (See, also, R. 911-917.) Defense witnesses who were present (R. 750; 985) denied that petitioner made the "I am proud of it" statements in July of 1951. The organizer of the rival union swore that these statements were never reported to him, although such evidence would have been of inestimable value at the time and the Government witnesses knew this (R. 929-951). An employer bargaining representative called by the defense (R. 805) denied the existence of a labor dispute which a Government witness had said was the occasion of a Communist meeting attended by petitioner. A defense witness denied the existence of inter-union rivalry as early as 1947 (R. 924-925), the time when a Government witness had said petitioner spoke of such rivalry as the reason for possibly having to execute the Taft-Hartley affidavit.

[15]Government witnesses had publicly expressed their intention to procure Bryson's arrest and conviction in order to take over his union, event though they had no evidence that he was a Communist (R. 728-745).

witnesses testified to the poor reputation of several of the prosecution witnesses for truth and veracity (R. 793, 920-921), and, contrariwise, to the excellent reputation of Bryson for those important traits of character (R. 793, 820-825, 850, 866-867, 874, 882, 895, 970, 999).[16]

At the conclusion of the entire case, motions for dismissal and for judgment of acquittal were made (R. 1085-b, 1085-G) and denied (R. 1085-DDD). After the jury was instructed and retired to deliberate, it requested a Webster's Dictionary (R. 1170). The trial judge summoned the jury back into court, where the following transpired:

> "The Foreman. Your Honor, the words 'affiliation' and 'member' are two words we were having difficulty with, some members of the jury, and we realize we have your note on that—
>
> The Court. You have the instructions on that subject.
>
> The Foreman. We have the instructions on that but they seem, some of them seem to feel there should be an elaboration on those two terms" (R. 1171).

The request for the dictionary was denied and no elaboration of "affiliation" or "member" was given. The following day, the jury returned a verdict of not guilty on the

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[16] Among those who so vouched for petitioner were ordinary seamen, a restaurateur, an important labor leader, the minister of one of the largest Negro churches in San Francisco. The record further reveals that to assist the probation officer in making his report, some "70 or 80 citizens in all walks of life, including two who are professors at universities and deans at colleges" urged that probation be granted, based upon their knowledge of and experience with petitioner (R. 6/14/55, pp. 2-4). The record also reveals Bryson to be a family man, presently making his living as a real estate salesman (R. 922-923).

"membership" count and of guilty on the "affiliation" count (R. 1182).

Before discharging the jury, the trial judge directed its members not to communicate with any person concerning the case and enjoined all persons from communicating with the jurors (R. 1180-1181). A motion to be relieved of the effect of this injunction was made (R. 1191) and denied (R. 1218) although it was shown that, despite the prohibition, some jurors had expressed to the public press lack of certainty about the meaning of the term "affiliation" (R. 1218). Motions in arrest of judgment, for judgment of acquittal and for a new trial were made and denied (R. 6/14/55, p. 1). Judgment and the maximum sentence of five years imprisonment and a $10,000 fine were thereupon imposed (R. 6/14/55, pp. 16-17). Notices of appeal were timely filed (R. 6/14/55, p. 17).

Although the Government conceded (R. 6/14/55, p. 19), and the trial court found (R. 6/14/55, p. 35), the existence of a substantial question on appeal, bail was initially fixed at $50,000, an amount which petitioner was unable to raise. A panel of the Court of Appeals later reduced bail (223 F.2d 775; App. 23-28).

Another panel of the Court of Appeals[17] affirmed the judgment on November 30, 1956, and on April 12, 1957 denied a petition for rehearing with a further opinion (App. 45-49).

[17] Including two District Judges. Cf. n. 3, *supra*.

## SPECIFICATION OF ERRORS TO BE URGED.

The court below erred in holding that:

1. The term "affiliation" as used in Section 9(h) of the Taft-Hartley law was not unconstitutionally applied to petitioner despite the facts that—

(a) neither the affidavit nor the indictment advised petitioner with reasonable certainty of the meaning of the term, contrary to the requirements of the Fifth Amendment;

(b) neither the affidavit nor the indictment warned petitioner that this Court's interpretation of the term in *American Communications Association v. Douds*, 339 U.S. 382, was not regarded by the Government as binding;

(c) neither the proof nor the charge complied with the requirements set forth in *American Communications Association v. Douds, supra.*

2. The trial court's instruction on "affiliation" was correct despite the fact that the instruction—

(a) defined the term in a manner contrary to this Court's decision in *Bridges v. Wixon*, 326 U.S. 135;

(b) failed to provide the jury with any legal standards by which to determine what was meant by the term;

(c) permitted the jury to convict petitioner solely upon the basis of activities protected by the First Amendment.

3. The conviction was supported by proper and competent evidence.

4. Prejudicial hearsay testimony respecting Communist Party "policy", received against petitioner, was not contrary to the rules of evidence and prior decisions of this Court.

5. The perjury rule is not applicable to a prosecution for false swearing under 18 U.S.C.A. 1001.

6. Petitioner did not have the right to interview members of the jury after the verdict in order to determine whether extraneous influences affected their understanding of the term "affiliation" and thereby unlawfully influenced the verdict.

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## REASONS FOR GRANTING THE WRIT.

This is the first case to come before this Court in which the "affiliation" provision of Section 9(h) alone is involved. How this term of "dubious scope" (Mr. Justice Frankfurter concurring in *American Communications Association v. Douds*, 339 U.S. 382, at 420, n. 2) actually was applied in a criminal case is a problem of first impression in this Court.

This case also presents other important questions relating to the administration of Section 9(h) presented but not decided in *Gold v. United States*, 352 U.S. 985[18] and

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[18] In *Gold*, the petition (No. 137, October Term 1956) presented, *inter alia*, these questions which are involved in or analogous to those at bar:

"1. Whether falsity of the 'membership' portion of the affidavit . . . is, or constitutionally can be, established by proof of membership in the Communist Party terminated before execution of the affidavit . . .

"2. Whether falsity of the 'support' portion of the affidavit is, or constitutionally can be, established without

*Jencks v. United States*, 226 F.2d 540, 553 (5 Cir.), cert. granted, 350 U.S. 980.[19]

any proof that the support was of an organization's advocacy of forcible overthrow of the government.

"3. Whether petitioner was convicted under an unconstitutional construction and application of Section 9(h).

"4. Whether the perjury rules of evidence must be applied to a prosecution for filing a false affidavit under Section 9(h).

"5. Whether the trial court erroneously instructed the jury on the meaning of membership and support in Section 9(h) . . .

* * *

"7. Whether the conviction is supported by evidence . . .

* * *"

When the Court, reversing on other grounds, failed to decide these questions, Mr. Justice Clark dissented, saying:

"It seems to me that proper judicial administration requires this Court to decide these important issues, particularly since they will arise again at the retrial. Furthermore, similar cases involving the same legal points are pending in various districts throughout the country" (352 U.S. at 986).

This is one of those similar cases to which Mr. Justice Clark referred.

[19]The *Jencks* petition (No. 23, October Term, 1956) presented, *inter alia*, the following question, specifically accepted by this Court for review (350 U.S. 980):

"Whether the trial court's instructions on the issue of affiliation,

(a) defined affiliation in a manner contrary to that decided by this Court in *Bridges v. Wixon*, 326 U.S. 135;

(b) provided the jury with a wholly confusing and misleading charge and failed to furnish it a useable legal yardstick in that the instruction both equated membership and affiliation and differentiated the two;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt, and abridged First Amendment liberties."

In a memorandum submitted at the request of the court after argument in *Jencks*, the Government urged that even if the case could be decided on narrower grounds, "the remaining questions should be decided", not only to give "guidance" in the event of a retrial, but because "such guidance will also be useful at other trials in which questions comparable to those raised here may be presented" (Supplemental Memorandum for the United States, *Jencks v. United States*, No. 23, October Term, 1956, p. 9).

The instant case presents the comparable questions to which the Government there alluded.

Other questions relating to the administration of criminal justice in the federal courts—the reliance upon past membership to prove present affiliation, the applicability of the perjury rule to a false swearing statute, the receipt of hearsay evidence to fasten Party policy upon petitioner, the prohibition against post-verdict inquiry to determine how the jury arrived at its verdict—are also important and require supervisory review by this Court.

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1. **THE TERM "AFFILIATION" WAS UNCONSTITUTIONALLY APPLIED TO PETITIONER HERE. (Questions 1, 2, and 3.)**

While *American Communications Association v. Douds*, 339 U.S. 382,[20] held that the term "affiliation" as there construed was not unconstitutionally vague for the purposes of a civil suit,[21] it is clear that the opinion does not foreclose inquiry into the manner in which the term is construed and applied in any given criminal case.[22] *Douds*

[20] Only Chief Justice Vinson and Justices Reed and Burton joined in the "opinion of the Court" in that case. Justice Frankfurter was of the view that "Congress has cast its net too indiscriminately" (339 U.S. at 419) and Justice Jackson appeared to harbor the same doubts (339 U.S. at 433, *et seq.*). Justice Black dissented, and Justices Douglas, Clark and Minton did not participate.

[21] In *Douds* the affidavit was considered in the context of civil actions relating to Board proceedings (339 U.S. at 386). Here the affidavit is the basis of a criminal prosecution and is therefore presented in quite a different light.

[22] Because of the lack of precision of the term, the Chief Justice recognized that there could be "circumstances" in which its use might render even the statute "unconstitutionally vague and indefinite" (339 U.S. at 413).

As to the difficulties which other judges have had with the same term, see (1) Judge Learned Hand in *Tolsky v. Wilson* (S.D. N.Y. 1920) cited in *Bridges v. Wixon*, 144 F.2d 927, 941, n. 1 (9 Cir.): "As to affiliation the case is not so clear, and depends upon how one

sustained the constitutionality of the statute because Congress found that the Communist Party sought to utilize union leadership to foment political strikes and because this Court thought it a reasonable inference that persons whose "affiliation"[23] with the Party could be established by "overt acts" would be likely to "engage in political strikes and other forms of direct action". Certainly there was no suggestion in this Court's opinion (or indeed in the statute) that persons who had long since terminated their associations with the Communist Party, or who had been supporters of the Progressive Party were to be regarded as affiliated with the Communist Party within the meaning of the statute. This construction of the statute, necessary to sustain it against the requirements of the First, Fifth and Sixth Amendments, was ignored here.

**A. The affidavit gave petitioner no notice that the word "affiliation" as used therein covered the activities of which he was here convicted.**

Nowhere in the affidavit was petitioner advised that the Board was disregarding this Court's gloss upon the statute. The affidavit gave petitioner no indication that the term was being used therein in any wider or different

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defines that word." (2) Judge Chase in *United States v. Reimer*, 79 F.2d 315, 317 (2 Cir.): Definition "is * * * impossible * * *". (3) Judge Major in *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247, 262 (7 Cir.): "Its meaning would be quite beyond the reach of the ordinary citizen."

[23] While the Chief Justice's opinion in *Douds* did not mention *Bridges v. Wixon*, 326 U.S. 135, there was nothing in it to suggest that the *Wixon* definition of affiliation had been overruled. In the earlier case this Court emphasized that to make out affiliation the "act or acts . . . must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities" (326 U.S. at 143).

sense than that which could be derived from a reading of *Douds:* Petitioner contends that once this Court has construed a statute, a citizen may rely upon its construction and assume that it becomes part of the statute and of all forms and affidavits which are utilized in connection therewith; a citizen has a right to assume that if he takes an oath, understanding a term therein to mean what this Court has said it means, he will not be prosecuted for false swearing.

Certainly, nothing in the affidavit put petitioner on notice that his long-past association with the Communist Party or his 1948 support of the Wallace candidacy would make his 1951 oath false. He was given no warning that his honest belief that such conduct did not constitute affiliation would not be determinative of the issue. He was not advised that he would be guilty of false swearing if the Government or a District Judge or jury understood the term differently. Petitioner could not be required to forswear an undefined "affiliation" and then be convicted of false swearing because others had a different comprehension of the term's meaning than he had. No matter how others may have viewed his past associations with the Communist Party or his 1948 support of Wallace, he could still, in the absence of a warning to the contrary, have entertained the "honest, untainted" belief (339 U.S. at 413) that he was not affiliated in 1951. The absence of anything in the affidavit to warn him to the contrary made of the affidavit a trap which four years later was closed on him by a verdict based upon some one else's different understanding of the words used. This is clearly an unconstitutional application of the statute to petitioner.

**B. The indictment did not advise petitioner of the crime charged with sufficient certainty to permit him to make his defense.**

The indictment, like the affidavit did not carry any statement of the facts and circumstances comprehended by the term "affiliation". It did not advise petitioner whether the term meant what this Court said it meant in *Douds*, or whether it meant the conduct and activity which this record now shows to have been the basis for the conviction. The indictment was therefore fatally defective and violative of the Sixth Amendment. *United States v. Hess*, 124 U.S. 483; *United States v. Cruikshank*, 92 U.S. 542. That the indictment was cast in the language of the statute does not cure the defect where, as here, the statutory language does not "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense . . ." (*United States v. Carll*, 105 U.S. 611, 613). An indictment which alleges only that petitioner was "affiliated" with the Communist Party, without setting forth the overt acts upon which the pleader's conclusion is based, is totally insufficient.[24]

**C. The evidence upon which petitioner's conviction rests manifests the unconstitutional application of the statute here.**

It is undisputed that the evidence of petifioner's active participation in Communist Party affairs terminated with the year 1947—four years before he signed the affidavit.

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[24]Petitioner sought to have the indictment clarified by pretrial discovery motions. If the Government had complied with Judge Morris' order (App. 9-11), it would have been required to advise petitioner, as requested in his motion for particulars, of "each and every overt act performed by the defendant which allegedly resulted in a relationship of affiliation with the Communist Party . . ." (Clerk's Transcript on Appeal; Motion for Bill of Particulars, *United States v. Bryson* [D.C. D.C. Crim. No. 1618-53]).

The only evidence subsequent to that date has to do with support of the Progressive Party in 1948 and the alleged post-affidavit admissions. None of this is enough to make out a constitutional application of the statute to petitioner. Nor does the evidence of alleged Party policy in 1947 justify a different result.

In order to sustain a conviction for false swearing it is clear that the Government must prove that petitioner did not entertain the honest belief in 1951 that he was not affiliated with the Party. It must establish the falsity of his oath by proof of overt acts showing his state of mind at the time he took the oath. This the evidence fails to do.

To suggest that four year old evidence of Party activity demonstrates the falsity of petitioner's 1951 oath, is to urge upon the Court a "presumption of continuity" which is so irrational and arbitrary as to amount to a denial of due process. *Maggio v. Zietz*, 333 U.S. 56; cf. *Schware v. Board of Bar Examiners*, ..... U.S. ....., 25 Law Week 4276, 4280; *Konigsberg v. State Bar*, ..... U.S. ....., 25 Law Week 4281, 4286; cf. *Wolf v. United States* 259 F. 388 (8 Cir.) Furthermore, it is to disregard the *caveat* of Chief Justice Vinson that the statute "is intended to prevent future action rather than to punish past action" (339 U.S. at 414).

Reliance upon petitioner's past associations with the Communist Party to establish "affiliation" of no avail for the additional reason that there is no evidence that those associations comprehended an unlawful purpose. During the period covered by this record, the Party was a "recognized political party in the State of California" (*Konigsberg v. State Bar*, ..... U.S. ....., 25 Law Week 4281, at

42[26]),[27] and even if petitioner were a member at that time, this cannot be taken as proof that then or later his connection was for any unlawful purpose. (Cf. *Langer v. United States*, 76 F.2d 817 [8 Cir.]). Thus the evidence (as well as the charge [*infra*]) cannot be said to meet the test of *Bridges v. Wixon*, 326 U.S. 135.

The court below, recognizing the necessity of proof of *present* affiliation goes to great lengths "to explain the absence of evidence of Bryson's active participation in Party functions after 1947, a deficiency which, [it concedes], . . . might be taken to indicate that Bryson had severed his connections with the Party" (238 F.2d 661; App. 35).

To do this it relies upon a scrap of hearsay testimony that in 1947 the Party adopted a "policy" that its trade union members would resign from the Party but would keep in "close touch and alliance" with it (238 F.2d 660; App. 31).[28] This Party policy is held to bind petitioner without any evidence that he concurred in it,[29] and is used

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[26] Cf. *Communist Party v. Peck*, 20 Cal.2d 586 (1942).

[27] The court's opinion neglects to mention that the Government witness had said that the resignations would be made "*so they could comply*" (R. 503). Apparently if there was a Party policy, it was adopted in reliance upon Chief Justice Vinson's observation that there was no one who might not by "a voluntary alteration of the royalties which impel him to action" become eligible to sign the affidavit (339 U.S. at 414).

[28] The entire evidence respecting what Bryson is alleged to have said in connection with this matter is as follows:

"A. He said that he was being faced with a terrific struggle on the waterfront with Harry Bundeberg of the SUP.

Q. Did he say anything further, sir?

A. And that he saw no present need for complying with the provisions of the Taft-Hartley Act.

Q. Did he say anything further, sir?

to explain the "absence of evidence" which otherwise might be taken to indicate that he had "severed his connections with the Party".

The glaring deficiency of this "evidence" upon which the court below so heavily relied is the total lack of corroborative support for it in the record. For if petitioner did indeed resign in name only, and if he had indeed kept in "close touch and alliance" with the Party thereafter, it is to be expected that the record would contain at least one scrap of evidence that he had done so. In the four years which followed the promulgation of this alleged policy and which preceded petitioner's execution of the affidavit, one might reasonably have expected at least one shred of evidence that once at least he had been in touch with a Party official or had attended a Party meeting or had contributed money to the Party or had subscribed to a Party periodical or had expressed views which were sympathetic to or even parallel with those of the Party. One may ask, rhetorically, what kind of "close touch and alliance" it is which over a period of four years is totally devoid of any evidence of relationships or contacts? What kind of "affiliation" is it which, as the court below was compelled to admit on denying a rehearing, is "not manifested by activity"? (..... F.2d .....; App. 48).[28]

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A. But at a later date it may prove necessary to file an affidavit.

Q. Do you recall anything further that he said?

A. Not what Mr. Bryson said, no." (R. 503.)

[28] Although the Government and not petitioner had the burden of proof on the issue, it is significant to observe that it was petitioner who established from the testimony of the "agent in charge" the existence of undercover agents in the waterfront section of the Communist Party in San Francisco both before and after 1947 and up to and including the time petitioner executed the affidavit (R.

For the same reasons, and even more compellingly, the evidence of petitioner's 1948 support of the Progressive Party does not make false his 1951 oath of non-affiliation with the Communist Party. Indeed, if the statute is now to be construed (contrary to the construction given it in *Douds*) so as to permit such a result, it clearly runs afoul of the First Amendment. *Schneiderman v. United States*, 321 U.S. 18; cf. *DeJonge v. Oregon*, 299 U.S. 351; *Herndon v. Lowry*, 301 U.S. 242.

The alleged 1951 admissions are of no avail to bolster this incredible case, not only because of the inherent improbability of their having been made under the circumstances related,[29] but because they lack the necessary corroboration. Cf. *Opper v. United States*, 348 U.S. 84; *Smith v. United States*, 348 U.S. 1. The court below believed it found this corroboration in the pre-1951 evidence (238 F.2d 662; App. 38). For the reasons already stated, that evidence could not, by any standards, tend to establish the commission of the offense in 1951 or in any way support the alleged after-the-fact admission.

The evidence of affiliation in 1951 was literally non-existent. It cannot properly even be dignified by calling it circumstantial; but even if it could, the circumstances were at the very least as consistent with an honest belief of non-affiliation as with the reverse. These scraps and tatters of evidence do not support the Government's heavy

1032-1034). The Government, however, called no one to testify that during the four years preceding the execution of the affidavit, Bryson had any connection whatsoever, in any shape, manner or form, with the Communist Party. This is evidence of "the most convincing character" that no such evidence existed. *Interstate Circuit v. United States*, 306 U.S. 208, 226.

[29] *Supra*, pp. 10, 11, notes 13 and 14.

burden of proof that petitioner swore falsely in 1951, and the inference which the jury was asked to draw therefrom was so arbitrary as to deprive him of due process of law.

**D. The charge to the jury contained an unconstitutional application of the term "affiliation" to petitioner.**

Long before *Douds* was decided, this Court made it clear that affiliation meant association for an unlawful purpose as distinguished from cooperation in mere lawful activities. *Bridges v. Wixon*, 326 U.S. 135. Such a distinction appears to be necessary here to avoid serious constitutional questions under the First Amendment. Yet in its charge the court nowhere explained this distinction to the jury. The jury was therefore free to convict petitioner even though it found from the evidence that at no time had he ever associated himself with the Communist Party in pursuance of any unlawful objectives.[30]

In view of the total lack of evidence that petitioner's association with the Communist Party was for illegal purposes, he was entitled to a charge which advised the jury that under those circumstances he was not, as a matter of law affiliated with the Communist Party. At the very least he was entitled to a charge that before he could be found to have been "affiliated", it was necessary that the jury find that his connections with the Party were for the purpose of advancing its unlawful objectives. He was entitled to have the jury know that if it found his cooperation with

[30] Indeed, the record is devoid of any evidence relating to the objectives of the Communist Party, and the Government deliberately rejected an invitation that the trial court take "judicial notice" of the nature and character of that organization (R. 900-F-G; 1008-G-H; 1085-I-K).

the Party to have been merely in lawful activities, it might acquit him.

The failure of the charge in this respect gave to Section 9(h) so broad a sweep as to embrace areas clearly protected by the First Amendment, and furthermore made the statute as here applied so vague and indefinite as to violate the Fifth Amendment.[31]

In addition, the charge was hopelessly confusing. It equated affiliation with membership in "all but name"; it told the jury to consider "any statements made or acts done by the accused", presumably at any time, to determine if he were affiliated; it told the jury to consider the "facts and circumstances" which it had previously said were relevant on the membership issue to aid in determin-

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[31] The court below recognized that a charge cast in the language of *Bridges v. Wixon* would have been "correct as a matter of law". But took the view that petitioner was precluded from raising the point because it claimed he had not preserved it on the trial (238 F.2d at 664; App. 41-42). The fact of the matter is that throughout the trial petitioner's counsel urged the *Wixon* case upon the court (see, e.g., R. 1085-T-V; 1085-PP-SS; 1085-ZZ-AAA; 719-L; 719-T; 719-RRR-SSS; 719-FFFF; 1127-1129). Indeed, the instruction *so far as it went* came almost verbatim out of the *Wixon* opinion. The trial judge must consciously have chosen to make no reference to illegality of purpose because there was no evidence in the record upon which he could have based such an instruction.

In any case, F.R.Crim.P. 52(b) will not permit such a "plain error" to stand in a case of this significance. *Clyatt v. United States*, 197 U.S. 207; *Brasfield v. United States*, 272 U.S. 448; *Screws v. United States*, 325 U.S. 91, 107; *Ruther v. United States*, 120 F.2d 968 (10 Cir.); *United States v. Raub*, 177 F.2d 312 (7 Cir.); *United States v. Cumberland*, 200 F.2d 609 (3 Cir.); *United States v. Sherman*, 200 F.2d 880 (2 Cir.); *Payton v. United States*, 222 F.2d 794 (D.C. Cir.); *Barfield v. United States*, 229 F.2d 936 (5 Cir.); *United States v. O'Connor*, 237 F.2d 666 (2 Cir.); *Woelfel v. United States*, 237 F.2d 484 (4 Cir.).

ing the affiliation issue (R. 1138-P-Q).[32] This charge is not only confusing and self-contradictory (cf. *Bollenbach v. United States*, 326 U.S. 607; *Barfield v. United States*, 229 F.2d 936 [5 Cir.]), but, by permitting the jury to rely upon pre-affidavit evidence without advising it of the possibility of the *locus penitentiae*, is directly contrary to the construction put upon the statute by this Court in *Douds*.

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All of the foregoing demonstrates that as applied here, the term "affiliated" was given a limitless scope which embraced among other things cooperation in activities protected by the First Amendment. Furthermore, in neither the pleadings, the evidence, nor the charge was the term given anything approaching an ascertainable standard of guilt as required by the Fifth Amendment and as spelled out in both *American Communications Association v.*

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[32]That the jury was in fact confused is seen not only by its later request for "elaboration" (*supra*, p. 12) and the post-verdict statements of two of the jurors (*infra*, p. 36), but by the fact that during its deliberations the jury did not know whether the terms "membership" and "affiliation" were the same or different. A note was handed up to the court requesting a black board (R. 1171); on the reverse side of that note, the original of which is in the Clerk's Transcript on file herein, appears a poll, apparently taken by the jury, as follows:

"Affiliated and member: same
different
same
same
different
same
different
different
same
different
different
different"

*Douds*, 339 U.S. 382, and *Bridges v. Wixon*, 326 U.S. 135. In affirming the judgment of conviction upon such a record, the court below has not only decided the case in a manner contrary to the decisions of this Court in those cases, but has permitted to stand a judgment resting upon the verdict of a jury which was left to roam at large through the evidence without adequate legal guidance. The jury was thus permitted to trespass upon First Amendment liberties; if indeed it could have known from the instructions just what it was doing.

To correct these glaring errors in this case of first impression, and one which has obvious importance to the future administration of Section 9(h), the writ should be granted and the case reviewed by this Court.

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2. **PREJUDICIAL HEARSAY TESTIMONY WAS ERRONEOUSLY RECEIVED AGAINST PETITIONER CONTRARY TO THE DECISIONS OF THIS COURT. (Question 4.)**

We have already adverted to the receipt of hearsay testimony concerning statements of Communist Party policy allegedly made in 1947 by the "trade union director of the Communist Party". Admittedly such hearsay testimony —without which the Government had no conceivable case against petitioner—was highly damaging to him and unless justified by an exception to the normal rule of exclusion, should not have been received. *Morris' Lessee v. Vanderen*, 1 Dall. 64; *Scott v. Radcliffe*, 5 Pet. 81; *Gaines v. Reif*, 12 How. 472; *Hopt v. Utah*, 110 U.S. 574; *Clement v. Packer*, 125 U.S. 309; *Donnelly v. United States*, 228 U.S. 243; *Llewellyn v. Electric Reduction Co.*, 275 U.S. 243; *Glasser v. United States*, 315 U.S. 60.

Petitioner was not confronted with this so-called trade union director and had no opportunity to cross-examine him. A conviction predicated upon such testimony presents serious questions of a denial of due process of law. 5 Wigmore *Evidence*, 3d ed., § 1397.

The court below sought to justify the use of this evidence against petitioner on one of two theories: "testimonial completeness" and the so-called "state of mind exception" to the hearsay rule—only in this case the state of mind involved was admittedly not that of petitioner but that of the Communist Party (238 F.2d 661; App. 34-35).[33] Neither theory justifies the use of this evidence against petitioner, evidence without which the conviction cannot stand.

The theory of testimonial completeness is predicated upon the proposition that petitioner was "replying" to the trade union director. However, as we have seen,[34] the record does not support this contention. Indeed, the record is clear that while the Government perhaps expected its witness to testify that Bryson "replied" to something that had been said, no such testimony was ever produced.[35] Bryson's statement that "he saw no present

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[33] In its opinion on rehearing the court below seems to rest its holding exclusively upon the "testimonial completeness" theory, erroneously asserting that petitioner makes no objection to that holding (____ F.2d ____; App. 49).

[34] *Supra*, n. 27.

[35] When the prosecuting attorney first offered the hearsay statement objection was sustained because, as the trial court observed, "* * * I don't suppose any of us would want to be held bound by everything that everybody says in our presence. I don't know how we could protect ourselves if we did." (R. 501; see also R. 491.)

The prosecutor then promised that the evidence would show that petitioner "made a statement by himself that incorporated

[1947] need for complying . . . but at a later date it may prove necessary to file an affidavit." (R. 503), is no evidence that he adopted what the trade union director said, and does not justify the use of the damaging hearsay testimony against him. In any case there cannot be distilled from this entire incident in 1947 an intention to file false affidavits in 1951. The purpose was to leave the Party "so that they could comply" (R. 503; see n. 26, *supra*) not to file false affidavits.

*Beaver v. Taylor*, 68 U.S. 637, cited by the court below, is clearly not in point. The issue in that civil action was whether plaintiffs had paid taxes in certain years. Letters and account books dealing with the years in question and kept in the regular course of business by a clerk who was proven dead at the time of the trial were held admissible. This is a far cry from what happened her. In the first place, oral declarations do not stand on the same footing of trustworthiness as written records kept in the regular course of business; secondly, there was no proof here of the unavailability of the hearsay declarant; thirdly, the books and records in the *Beaver* case dealt with the very period in question, whereas here the oral hearsay deals with a period four years remote in point of time.

The ultimate issue at bar was Bryson's state of mind in 1951, when he signed the affidavit, not, as the court below apparently thought, his or the Party's state of mind in 1947. Whatever petitioner's intention was in the earlier year, he could not have been convicted unless he had guilty

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a substantial part and showed an understanding of what had been said" (R. 501-502). As we have seen, *supra*, n. 27, this promise was never kept; nevertheless, the court reversed itself and permitted the hearsay testimony to be received.

knowledge in 1951. This is basic to the statute. The fact that it was constantly overlooked by the court below in its holding if not in its opinions, is what led the court into the myriad errors which it made.

The court below held that the hearsay testimony was admissible upon the alternative ground that it showed the Party's "state of mind" (238 F.2d 661; App. 35). Of course, it is petitioner's state of mind, and his alone, which is relevant to this case. In addition to completely ignoring once again the four year time gap, the position of the court below has the vice of assuming that which is sought to be proved: that Bryson was affiliated with the Party. For clearly, if he were not, Party policy would be totally irrelevant. To put it another way: the only manner in which Party policy can be relevant is if there is proof (or an assumption) of "affiliation".[26] To argue as the court below does is to indulge in circular reasoning and is literally to lift oneself by one's bootstraps.

The cases which the court below cites in this connection are totally inapposite. *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, was a civil case in which the fact at issue was the presence of a person at a specified place on March 8, 1879. Letters *he* had written on March 1st and March 5th—*two to two and a half weeks earlier*—indicating his intention to go to that place, were held to be admissible. Nothing was said in the opinion to indicate that

[26] We assume for the sake of argument that the status of affiliation" would be enough to fasten upon a defendant the "policy" expressed by a Party spokesman. This, of course, is highly doubtful. Cf. *Schneiderman v. United States*, 320 U.S. 118; *Wieman v. Updegraf*, 344 U.S. 183; *Konigsberg v. State Bar*, ___ U.S. ___, 25 Law Week 4281.

a statement of *some other person* made *four years prior* to the critical date, would be admissible in a *criminal* case. *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2 Cir.), dealt only with a special rule of evidence in civil libel cases and contains no intimation that hearsay such as was here received would be admissible in a criminal proceeding.

The fact that in other Taft-Hartley cases similar evidence was admitted (238 F. 2d 661; App. 35) becomes irrelevant upon an analysis of those cases. In none of them, as distinguished from this one, was there a four year gap between the last association with the Party and the execution of the affidavit. In each of them there was some evidence (we do not comment upon its weight) to connect the defendant with the Party "during the critical period" (*Fisher v. United States*, 231 F.2d 99, 103 [9 Cir.]; cf. *Hupman v. United States*, 219 F.2d 243, 247 [6 Cir.]; *Jencks v. United States*, 226 F.2d 540, 544 [5 Cir.]).

This hearsay testimony was vital to the Government's case since it was the "explanation" for the "absence of evidence" against petitioner during the critical period (238 F.2d 661; App. 35). By sanctioning its admission contrary to the rules of evidence and the decisions of this Court cited above (p. 28), the court below has permitted such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power over the inferior federal judiciary.

### 3. THE PERJURY RULE IS APPLICABLE AND WAS NOT COMPLIED WITH HERE. (Question 5.)

This question was left specifically undecided in *Gold v. United States*, 352 U.S. 985; see *supra*, n. 18, and is again presented in this case because it is clear from the facts that the evidence here does not satisfy the requirements of the perjury rule and because the record shows that the jury was instructed, contrary to the rule, that it could convict upon circumstantial evidence alone (R. 1138-O-Q).

The perjury rule, of ancient origin (7 Wigmore, *Evidence*, 3d ed., §§ 2030-2044) yet retaining its vitality into modern times (*Weiler v. United States*, 323 U.S. 606), requires that before there can be a conviction for perjury (and this applies to false swearing under 18 U.S.C.A. 1001) there must be either the *direct* evidence of two witnesses or the *direct* evidence of a single corroborated witness to the falsity of the oath. *United States v. Wood*, 14 Pet. 430; *Hammer v. United States*, 271 U.S. 620; *Weiler v. United States*, 323 U.S. 606.

The rule applies to any case in which the issue is the falsity of an oath, whether denominated perjury or not. *United States v. Wood, supra; Hammer v. United States, supra; United States v. Isaacson*, 59 F.2d 966 (2 Cir.); and see the state cases collected in Wigmore, *op. cit.*, § 2042, n. 9. In the present case the gravamen of the offense was the execution and use of a false affidavit, i.e., a false oath. Therefore, even though 18 U.S.C.A. 1001 may in some situations punish false statements not under oath, this case presents the classic situation of "oath against oath" and

there is every reason why the perjury rule should apply here.[37]

The direct evidence which is required to satisfy the rule is sharply distinguished from circumstantial evidence. The latter will not suffice to prove the falsity of an oath. *United States v. Nessanbaum*, 205 F.2d 93 (3 Cir.); *Spaeth v. United States*, 218 F.2d 361 (6 Cir.). To prove the falsity of an oath, the evidence must be "strong, clear, convincing and direct" (*United States v. Neff*, 212 F.2d 297, 307 [3 Cir.]), and must establish "the fact to be proved without the necessity for . . . inference" (*Radomsky v. United States*, 180 F.2d 781, 783 [9 Cir.]).

It is clear that the evidence here does not meet these tests. Affiliation with the Communist Party is an objective fact which is capable of being proved by direct evidence. The court below so recognized in its opinion on the denial of rehearing (..... F.2d .....; App. 48), as did this Court in *Douds* (339 U.S. at 410). In this respect at least, affiliation can be proved as objectively as membership. Cf. *United States v. Remington*, 191 F.2d 246 (2 Cir.), cert. den. 343 U.S. 907; *Bridges v. United States*, 199 F.2d 811, (9 Cir.), reversed on other grounds 346 U.S. 209. Affiliation may be proved by direct evidence showing financial assistance, contributions of time or energy, sustained cooperation, etc.—all to further an illegal objective (*Bridges*

[37] Indeed, in the *Douds* case the concurring Justices referred to the crime as "perjury" (339 U.S. 420, 436); and while the Chief Justice called it "false swearing" (*ibid.*, at 411) rather than "perjury", there is no intimation in his opinion that the falsity of an oath was not the gist of the offense. A reading of the whole of his opinion indicates that he had no doubts upon the point.

*v. Wixon*, 326 U.S. 135). Here there was no such direct proof of affiliation in 1951.

The Government's direct evidence consisted only of (1) pre-1947 connections with the Party; (2) hearsay testimony regarding a 1947 policy of the Party to resign in order to comply; (3) activity in support of the Progressive Party in 1948; and (4) uncorroborated post-affidavit "admissions" of membership. But none of this is direct evidence that petitioner's oath that he was not affiliated with the Party in April of 1951 was false. At best it is necessary to "infer" from this evidence that petitioner was affiliated when he swore he was not. We have heretofore stated why we believe that such an inference cannot rationally be drawn. Here, we note that at its strongest the Government's case is an inferential one, i.e., a circumstantial one, and to that extent it cannot withstand the "stringent rule" (*Weiler v. United States*, 323 U.S. 606, 609) required in a false swearing case.

To determine this question of obvious importance for the future administration of Section 9(h) which was left undecided in *Gold v. United States*, 352 U.S. 985, the writ should issue and this Court should review the record.

**4. THE REFUSAL OF THE TRIAL COURT, SANCTIONED BY THE COURT BELOW, TO PERMIT INQUIRY OF THE JURY IN ORDER TO ASCERTAIN WHETHER EXTRANEOUS INFLUENCES RESULTED IN ITS VERDICT, IS CONTRARY TO THE DECISIONS OF THIS COURT AND IS A DEPARTURE FROM NORMAL JUDICIAL PRACTICE. (Question 6.)**

The trial judge forbade anyone from communicating with any of the jurors for any purpose (R. 1180-1181).[38] Despite this order, a newspaperman communicated with the jurors to ascertain what they understood the word "affiliation" to mean. Two of them were uncertain as to its meaning, saying, "A higher court [will] have to make the final determination of the meaning of 'affiliation' as the word applied to Bryson".[39] Petitioner thereupon moved to be relieved of the order so that he could ascertain whether any extraneous or illegal considerations had entered into the jury's deliberations and whether what was unclear throughout the trial and even after the verdict, had been resolved not be proper, but rather by improper, methods. Such an inquiry petitioner was not permitted to make.

While it is generally true that jurors may not impeach their verdict, this Court has allowed the testimony of jurors to be received to show whether extraneous, illegal or improper considerations entered into their deliberations

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[38]The Government later conceded that there were "some doubts" as to the "propriety" of such an order (R. 1215-1216). Apparently the trial judge later was of the same view, for when his attention was called to its disobedience by a newspaperman, he refused to do anything about it (R. 1219-1221).

[39]See Ex. A, p. 2, to the affidavit of Richard Gladstein in support of Motion To Be Relieved of Court Order Imposing Silence upon Members of the Jury, filed in the court below on June 6, 1955, and included in the Clerk's Record on Appeal here.

and influenced their verdicts. *Mattox v. United States*, 146 U.S. 140;[40] cf. *Holmgren v. United States*, 217 U.S. 507; *Hendrix v. United States*, 219 U.S. 579; *Clark v. United States*, 289 U.S. 1. The cases in the inferior courts in which jurors' affidavits have been received in support of post-verdict motions are countless. See, for example, *Orenberg v. Thecker*, 143 F.2d 375 (D.C. Cir.); *Ryan v. United States*, 191 F.2d 779 (D.C. Cir.); *United States v. Furlong*, 194 F.2d 1 (7 Cir.); *Woollomes v. Heinze*, 198 F.2d 577 (9 Cir.); and *Callanan v. United States*, 223 F.2d 171 (8 Cir.).

Petitioner should not have been denied the right accorded to other litigants of finding out, if he could, whether any extraneous influences operated on the jury in this case. This is particularly so where, as here, enough had already occurred to justify the view that such influences might have been present. In considering whether the erroneous ruling was prejudicial there must be borne in mind these facts: the jury had already expressed its lack of clarity on the meaning of the term "affiliation"; in its deliberations it appeared not to know whether the term meant the same thing as membership or otherwise;[41] and even after the verdict two jurors were still uncertain as to the meaning of their verdict.

All that petitioner sought was an opportunity to ascertain what the facts were. The denial of that opportunity

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[40] In the *Mattox* case this Court adopted as correct the following statement of the rule from the opinion of Mr. Justice Gray in *Woodward v. Leavitt*, 107 Mass. 453: ". . . a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence . . ."

[41] *Supra*, n. 32.

is contrary to the decisions in this Court and in other Circuits, and should be reviewed here.

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## CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June, 1957.

Respectfully submitted,

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
*Counsel for Petitioner.*

**(Appendix Follows.)**

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## Appendix

In the United States District Court for the Northern District of California, Southern Division

No. 33559

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

### ORDER

Defendant herein has filed a motion to dismiss, a motion to compel election, and a motion for a bill of particulars in relation to an indictment which charges that the defendant "in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully and wilfully make, use, and cause to be made, and used a false writing and document, namely an 'Affidavit of Non-Communist Union Officer'—Form (NLRB 1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to wit: that he was not a member of the Communist Party, whereas the said Hugh Bryson then and there well knew that he was a member of the Communist Party".

The second count is in the same language with the exception of the substitution of the words "affiliated with

the Communist Party" in lieu of "was a member of the Communist Party".

The test to be applied to the sufficiency of an indictment is not to look for mere formal defects and academic distinctions. The test is whether it contains the necessary elements of the offense intended to be charged. *Hagner v. U. S.*, 285 U. S. 427, 431. This indictment clearly apprises the defendant of what he must be prepared to meet.

Upon the authority of the well considered opinion in *U. S. v. Walter C. Lohman, Jr.*, and *U. S. v. Everst Melvin Hupman*, No. 2705 Criminal at Dayton, as yet unreported but copies of which have been submitted, it is ordered that the motion to dismiss be and it is hereby denied.

Finding no merit whatsoever in the motion to compel election, it is denied without further comment.

As to the motion for a Bill of Particulars, Rule 7 F of the Federal Rules of Criminal Procedure provides that "The Court for cause may direct the filing of a bill of particulars". It is urged that the particulars requested would simply require the government to state the overt acts upon which the indictment is based. If this were done, it would in my opinion, force the government to spread before the accused its entire case. Such is not the function of a Bill of Particulars. Accordingly, that motion is also denied. *American Tobacco Co. v. U. S.*, 147 Fed. 2d, 93 (C.A. 6); *Hughes v. U. S.*, 114 Fed. 2d, 285 (C. A. 6).

Dated: June 3, 1953.

Edward P. Murphy
United States District Judge

In the United States District Court, for the Northern District of California, Southern Division

No. 33630

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

## MEMORANDUM AND ORDER

The defendant is charged in two counts with a violation of 18 U.S.C., 1001 for making and using a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form N.L.R.B. 1081) and mailing the same in San Francisco to the National Labor Relations Board in Washington, D. C., and thereby filing and causing to be filed said affidavit with the National Labor Relations Board in Washington, D. C., knowing the same to contain a false, etc., statement. In Count 1 the alleged false statement is that the defendant was not a member of the Communist Party, and in Count 2 the alleged false statement is that the defendant was not affiliated with the Communist Party.

The substance of the challenges made to the present indictment was made before Judge Murphy on the hearing of the motions made by the defendant in the case of United

States v. Eryson, Criminal No. 33559, and they were decided adversely to the defendant. The present indictment is simply a corrective indictment and differs from No. 33559 only in respect to the allegations of mailing in this District for the purpose of more clearly establishing venue in this District. These allegations do not change the basic theory of the indictment and, therefore, the ruling of Judge Murphy should be adhered to for the reasons set forth in his Order in No. 33559.

The challenge of the defendant to the venue of this action does raise a problem to which this court should give careful attention. The indictment pleads that the alleged false document was mailed or caused to be mailed by the defendant in the City and County of San Francisco, State of California, and within the Northern District of California, to the National Labor Relations Board in Washington, D. C. Section 159(h) of Title 29, U.S.C. requires the filing of the so-called non-communist affidavit with the Board by the officers of a labor organization seeking the benefits of the Labor Management Relations Act. The officer is required to state that ". . . he is not a member of the Communist Party or affiliated with such party, . . ." Title 18 U.S.C., Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Paragraph VII of the Motion to Dismiss alleges:

> "There is no venue in the Northern District of California in that the indictment charges that the defendant filed and caused to be filed the alleged false writing and document with the National Labor Relations Board, an agency of the United States, in Washington, D. C., and not in this district."

The government relies on 18 U.S.C. Section 3237 to meet this challenge. That Section provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> "Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

It is the position of the government that the Indictment alleging mailing of the alleged false affidavit in the Northern District of California and filing in the District of Columbia is sufficient to bring venue in the former District and to invoke the venue provisions of Section 3237. Research does not disclose any cases directly construing the applicability of Section 3237 to Section 1001, but under old Section 80, the predecessor to Section 1001, the court said that there was venue in both the District of mailing and the District of filing. *United States v. Eisler*, 75 F. Supp. 634. In other actions not related to Section 1001 it has

been held that the District where the mailing took place has venue. *Bridgeman v. United States*, 140 Fed. 577 (1905); *United States v. Downey*, 257 Fed. 366 (1919); *In re Pollissier*, 136 U.S. 257 (1890); *United States v. Lombardo*, 241 U.S. 73 (1915).

The import of Section 3237 and the cases above cited seem to support the contention of the government. Therefore, as a matter of pleading the court must rule that the Motion to Dismiss on the ground of improper venue is not well taken. However, since this is a problem of pleading, and since the conclusion reached is not free from question as a matter of pleading without consideration of the problem of proof, the court should point out that the problem would not be present if the indictment was returned in the district in which the alleged false affidavit was filed. It is only necessary to point to the recent case of *Bridges v. United States*, 346 U.S. 209, to illustrate the point.

It Is Therefore Ordered that the Motions of the defendant to:

1. Dismiss the Indictment,
2. Compel Election, and
3. For a Bill of Particulars

are, and each of them is, hereby denied.

Dated, August 14, 1953.

Oliver J. Carter,
United States District Judge.

In the United States District Court for the Northern District of California, Southern Division

| | |
|---|---|
| United States of America, Plaintiff, vs. Hugh Bryson, Defendant. | No. 33630 |
| United States of America, Plaintiff, vs. Hugh Bryson, Defendant. | No. 33559 |

ORDER GRANTING LEAVE TO DISMISS INDICTMENTS

Rule 48(a) F.R.C.P.

The United States Attorney, at the direction of the Attorney General, seeks leave of court to file dismissals of the indictments in these cases. Rule 48(a) F.R.C.P. An indictment charging the same offense against the defendant is now pending in the United States District Court for the District of Columbia.

It has become the duty of the Attorney General to determine in which jurisdiction the offense charged "was probably committed and bring the offender to trial there." *Haas v. Henkel*, (1910) 216 U.S. 462.

He has made such determination by requesting leave of Court to dismiss the indictments in this District. His de-

cision in that regard appears to be based on good reason, i.e., that the offense was probably not committed in this District, but was probably committed in the District of Columbia. 18 USC §1001; 29 USC 159(h); *United States v. Valenti* (3 Cir.) 1953, 207 F. 2d 242; see also *U. S. v. Lombardo*, 1916, 241 U. S. 73.

Leave to file dismissals of the indictments is granted.

Dated: November 24, 1953.

Louis E. Goodman,
United States District Judge.

United States District Court
for the District of Columbia

Criminal No. 1618-53

United States of America,
v.
Hugh Bryson,

ORDER

This cause having come on for hearing before this Court on the several motions of the defendant to dismiss the indictment, for a hearing on the qualifications of the grand jurors, for a Bill of Particulars, for a list of Government witnesses, for a change of venue pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, for discovery and inspection pursuant to Rules 16 and 17(c) of the Federal Rules of Criminal Procedure, and on the motion of the United States to quash a subpoena duces tecum purportedly served on the United States Attorney by the defendant, written briefs on such motions having been submitted and upon consideration of the motions and arguments of counsel, and for cause shown, it is this 29th day of March, 1954,

Ordered:

1. That the defendant's motion to dismiss the indictment be, and the same hereby is, denied;

2. That the defendant's motion for a hearing on the qualifications of the grand jurors who returned the present indictment be, and the same hereby is, denied;

3. That the defendant's motion for a list of the witnesses the Government intends to present at trial be, and the same hereby is, granted;

4. That the defendant's motions for a Bill of Particulars and a supplemental Bill of Particulars be, in the respects stated in the motions, and the same hereby are, granted, and that the particulars shall be furnished to the defendant within 60 days of the date hereof.

5. That the defendant's motion for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure insofar as it relates to books, papers, documents and objects obtained from, or belonging to the defendant, and all such items, or copies thereof, obtained from others by seizure or process, and material to the instant charges be, and the same hereby is, granted, and that such items or copies shall be furnished to the defendant within 60 days of the date hereof.

6. That the defendant's motion for production of documentary evidence before trial pursuant to Rule 17(c) insofar as it relates to any written statements of the defendant or any statements of witnesses signed or prepared by them and material to the instant charges be, and the same hereby is, granted, and that such statement or copies thereof shall be furnished to the defendant within 60 days of the date hereof.

7. That the subpoena duces tecum purportedly heretofore served on the United States Attorney be, and the same hereby is, modified to include only those statements of the defendant and of witnesses required by paragraph 6 of this Order, and in all other respects is quashed;

8. That this Order shall not be construed as a limitation of or as a restriction on the right of the Government to utilize other witnesses as the exigencies of the trial may warrant with the understanding that appropriate notice thereof and opportunity to inspect signed statements be given to the defense under conditions imposed by the Court in its discretion.

James W. Morris,
Judge.

No objection as to form.

Edward P. Troxell,
Assistant United States Attorney,
Attorney for United States of America.

Joseph Forer,
Attorney for Defendant.

In the United States District Court for the Northern District of California, Southern Division

No. 34105

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

MEMORANDUM OPINION

Murphy, District Judge.

This is a motion by the Government to vacate an order of the United States District Court for the District of Columbia and to quash a subpoena served under Rule 17(c) which is supplemental to that order. Defendant moves to quash the Government's motion.

The indictment was brought in the District of Columbia, charging, in three counts, violations of Title 18 USC, Sec. 1001, namely, that Bryson filed with the National Labor Relations Board NLRB Form 1081, "Affidavit of a Non-communist Union Officer", knowing that the same contained false representations to wit:

(1) That he was *not a member of* the communist party—charged in count one.

(2) That he was *not affiliated with* the communist party—charged in count two.

(3) That he *did not support* any organization that believed in or taught the overthrow of the United States Government by force, here specifically the communist party—charged in count three.

Defendant filed eight motions in the District of Columbia: (1) Motion to dismiss indictment; (2) Motion for Bill of Particulars; (3) Motion for Supplemental Bill of Particulars; (4) Motion for list of Government witnesses; (5) Motion for Discovery under Rule 16; (6) Motion to inspect certain documents in hands of United States Attorney under Rule 17(c); (7) Motion for a hearing on the qualifications of the Grand Jury; (8) Motion for transfer of the proceedings to the Northern District of California under Rule 21(b).

After the filing of memorandums and oral argument Judge Morris granted certain of the motions and parts of others. The motion to vacate encompasses Judge Morris' whole order. The ruling on the motion to transfer was reserved until the filing of the bill of particulars. The Government filed a motion for rehearing on certain of the motions granted which was denied.

The Government bill of particulars alleged that (1) the jurat of the affidavit was executed in San Francisco, California, and (2) the affidavit was mailed to the board in San Francisco and received by the board by mail. The defendant filed an admission to the effect that he signed and executed the affidavit in San Francisco, which was mailed at his request from that city. Judge Morris then ordered the case transferred to this District under Rule 21(b).

We are met at the threshold with the problem of whether venue is now properly laid in this District. I take it that

this Court, or indeed any other District Court has jurisdiction of criminal offenses against the United States (18 USC 3231) and thus this offense. Proving proper venue is part of the Government's case without which there can be no conviction. *U. S. v. Brathman*, 191 F. 2d 70 (2d Cir. 1951); *U. S. v. Jones*, 174 F. 2d 247 (7th Cir. 1949); *Moran v. U. S.*, 264 Fed. 768 (6th Cir. 1920). Unless venue is properly laid, or unless any defect can be waived by the defendant and has already been waived, it is absurd for this Court to extend the use of its proceedings toward a conclusion which in the end may be nugatory. Cf. *In re Schleindt*, 74 F. Supp. 618 (D. Ore. 1947). We need not trace this problem to the disposal of criminal cases in the vicinage which predates the Norman Conquest for it has been crystalized in the Constitution. Article III, Sec. 2, provides in part:

> "The trial of all crimes . . . shall be by jury and such trial shall be held in the State where the said crime shall have been committed; . . ."

And in the Sixth Amendment it is provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherever the crime shall have been committed . . ."

Venue is now governed by Rule 18 which dictates that "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."[1] A transfer under Rule 21(b), which occurred here, requires that two conditions be met:

[1] This venue provision was substantially the same before the Rules and was contained in a statute—former Sec. 114 of Title 28.

(1) that it appear from the indictment or information, or from a bill of particulars "that the offense was committed in more than one district" . . . one of which must be the district to which the proceedings are transferred, and (2) that the transferring court be satisfied the proceeding should be transferred in the interests of justice.[2]

Thus proper venue in this district, either as a constitutional matter or as a matter of the rules depends upon the indictment and bill of particulars showing that the offense was committed in this District. There is dicta to the effect that a Rule 21(b) transfer is not reviewable by the receiving district. *Holdsworth v. U. S.*, 179 F. 2d 933, 937 (1st Cir. 1950).[3] I agree that the transfer insofar as it is discretionary with the transferring court probably can not, and at least should not be reviewed by the receiving court in the absence of a change of circumstances. The question of whether the interests of justice will be served by transfer is discretionary. But the other necessary condition of transfer—that the offense was committed in the receiving district—I do not view as discretionary. I consider it proper, indeed my duty, to review this determination, at least to insure that the exercise of jurisdiction by this Court will not be impotent.

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[2]Rule 21(b) is not technically an exception to Rule 18 since its exercise requires that the offense be committed in the district to which the proceedings are transferred. Venue was and is properly laid in a district in which the crime was committed. 18 USC §3237. Formerly in the case of a crime committed in two districts, the Attorney General was required to make an election. Haas v. Henkel, 216 U.S. 462 (1910). The proper district is now in the discretion of the court under Rule 21(b).

[3]The Holdsworth case held that an order by the receiving court holding that venue was not properly laid there and returning the case to the sending court was interlocutory and therefore not reviewable.

There is doubt in my mind that the offense charged is of a type that can be committed in this District by executing and mailing the affidavit here. Cf. *U. S. v. Valenti*, 207 F. 2d 242 (3rd Cir. 1953); see — Judge Goodman's Order granting leave to dismiss indictment in *U. S. v. Bryson*, Crim. No. 33559 and 33630 (N. D. Calif. 1953); and cf. Judge Carter's Order in Crim. No. 33630 (N. D. Calif. 1953). But as I view the venue problem, I need not decide this question. The defendants have waived any question of proper venue by requesting the transfer.

The Circuits which have considered the problem have uniformly held that the Constitutional provisions are not jurisdictional and can be waived.—Second Circuit: *U. S. v. Jones*, 162 F. 2d 72 (2d Cir. 1947); *U. S. v. Lotsch*, 102 F. 2d 35 (2d Cir. 1939); Third Circuit: cf. *U. S. v. Gallagher*, 183 F. 2d 342 (3rd Cir. 1950); Sixth Circuit: *Shetterly v. U. S.*, 205 F. 2d 834 (6th Cir. 1953); cf. *Earnest v. U. S.*, 198 F. 2d 561 (6th Cir. 1952); Eighth Circuit: cf. *Levine v. U. S.*, 182 F. 2d 566 (8th Cir. 1950) (cert. den. 340 U. S. 921); Ninth Circuit: *Rodd v. U. S.*, 165 F. 2d 54 (9th Cir. 1947), cf. *Nemec v. U. S.*, 191 F. 2d 810 (9th Cir. 1950); Tenth Circuit: *Mahaffey v. Hudspeth*, 128 F. 2d 940 (10th Cir. 1942); District of Columbia Circuit: *Hagner v. U. S.*, 54 F. 2d 446 (D. C. Cir. 1931) aff'd 285 U. S. 427 (1932) holding that the constitutional question need not be decided.[1] Although none of these cases discussed the waiver of a venue provision contained in the Rules or in a statute,

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[1]Judge Fee is of a different view. See *U. S. v. Bink*, 74 F.Supp. 603 (D. Ore. 1947); cf. *U. S. v. Bishop*, 76 F.Supp. 866 (D. Ore. 1948). See: *U. S. v. Holdsworth*, 9 F.R.D. 198 (D. Me. 1949) which treats the constitutional provision as jurisdictional. This approach was disapproved on appeal. *Holdsworth v. U. S.*, 199 F.2d 933 (1st Cir. 1950).

nearly all of them were decided while venue was controlled by former Section 114 of Title 28 which provided that all prosecutions shall be had "within the division of such districts where the same were committed. . . ." Venue as between divisions could be waived. *Silverberg v. U. S.*, 4 F. 2d 908 (5th Cir. 1925). If venue as a constitutional right can be waived, venue as a statutory right certainly can be.

The defendant has waived any question of proper venue. There is dicta in *Holdsworth v. U. S.*, 179 F. 2d 933, 937 (1st Cir. 1950) that a request to transfer under Rule 21(b) is such a waiver. This circuit has held that the objection to venue is waived by failure to object in the trial court even when the indictment shows on its face that venue is not properly laid. *Rodd v. U. S.*, 165 F. 2d 54 (9th Cir. 1947). Although the venue question can normally be raised even by a motion for judgment of acquittal and the time for any such motion appears to be in the distant future, I hold that the defendant's acts here have finally and unequivocally waived any question of venue. I can think of no more explicit choice of forum that that exercised here. Proper venue in this case is a close question. The defendant's attorney made a motion for transfer under Rule 21(b) supported by a twenty-four page memorandum of points and authorities. The defendant filed a three page affidavit insisting that justice could be served only in this District and stating that the transfer would be in accord with the principles of Rule 18, the Sixth Amendment and Article III of the Constitution. The Government originally opposed the motion but when the defendant signed an admission of the facts on which he based his application under Rule 21(b), the Government withdrew the objection.

Defendant in a prior similar indictment brought in this District moved to dismiss on the grounds that venue was not properly laid here. The opposite of the position taken in the case in the District of Columbia. This vacillation is at an end. This case will not be whip-sawed between districts. The case will be tried here.

This brings us to the motion to vacate the order of the District of Columbia District Court.

The first question is the power of the court to vacate such an order. Rule 21(c) provides that when a transfer is ordered the file shall be transferred to the receiving court "and the prosecution shall continue in that district or division." This rule envisions a continuity of procedure and under it this Court has the same power as would obtain in the transferring court had the case not been so transferred. Interlocutory orders are not res adjudicata (In re Walton Hotel Co., 116 F. 2d 170 (7th Cir. 1940) and courts possess the power to modify them.

Although defendant's counsel in his motion to quash the Government's motion intimates that the prior adjudication is final, in oral argument he conceded that the power to vacate exists. Defendant insists, rather, that the power should not be exercised here.

He argues that sound judicial procedure requires that once a matter has been fully presented, argued and decided, it should be laid at rest in the absence of a showing of new circumstances. In a broad sense this approach is eminently sound.

There is another factor present here. Although pre-trial procedures in all districts are governed by substantially

the same rules and should therefore be uniform in content and approach, the sad and plain fact is that in practice they are not. The pre-trial procedure has no function independent at the trial its *if*. It is auxiliary and subordinate to the trial. I am firmly convinced that such procedure should reflect and be consistent with, indeed be governed by, the procedure in the district where the trial will be had. After a careful reading of all the file, I believe that had the motions been presented to me as an original proposition, I would have denied them all. But this is not the test. Insofar as the prior ruling is based upon an approach to criminal trials which is different from the approach that exists in this District or conflicts with the settled practice in this District, the order should be vacated. The individual portions of the order of the District of Columbia Court will be taken up seriatim.

A. *The defendant's Motion for a Bill of Particulars.* The approach to this problem is considerably different in the courts of District of Columbia and in the Courts in this Circuit. Compare *U. S. v. Lattimore*, 12 F. Supp. 507 (D.C. D.C. 1953) with *Remmer v. U. S.*, 205 F. 2d 277 (9th Cir. 1953). See *Fredrick v. U. S.*, 163 F. 2d 536 (9th Cir. 1947). I can only reiterate what I said in the same matter in Criminal No. 33559, (N. D. Calif. 1953), and which was reaffirmed by Judge Carter in Criminal No. 33630 (N. D. Calif. 1953). I believed it to be the law in this Circuit then, and believe it to be now. "It is urged that the particulars requested would simply require the Government to state the overt acts upon which the indictment is based. If this were done, it would in my opinion, force the Government to spread before the accused the entire case. Such is

not the function of a bill of particulars." That portion of the order will be vacated.

B. *Motion for a List of Government Witnesses.* The District of Columbia Court ordered that the Government furnish to defendant a list of witnesses the Government intended to present at the trial, but provided that the Government could use other witnesses as the exigencies of the trial might warrant with the understanding that appropriate notice thereof and opportunity to inspect signed statements be given to defense under conditions imposed by the court in its discretion. The short answer is that this is not done in this District. It is perfectly clear that no right exists in a non-capital case to obtain these names. With no intention to disparage in any way the attorneys or indeed anyone connected with this case, this Court recalls that in a case not so long ago tried here, it was necessary here to guard the Government witnesses and that when the guards were removed one witness was severely beaten. We would be naive if we did not recognize that witnesses in criminal cases are subject to pressures from all sides. The rights of the defendant against undue surprise can be, and I am sure will be, amply protected by the trial judge. This portion of the order will be vacated. As an aside, we might add that the defendant already knows the names of some thirteen government witnesses. The practice in the District of Columbia of requiring a plea and setting a trial date on arraignment put in motion the subpoena process to the Government witnesses. The returns to these subpoenas are in the file.

C. *Order under Rule 16.* The District of Columbia Court ordered the discovery and inspection of all books,

papers and documents obtained by the Government from the defendant and all such items obtained from others by seizure and process. Rule 16 is a discovery rule and this type of material can be reached by the Rule in this District upon a showing of good cause. Although from my reading of the file no such good cause has been shown, the procedure used does not conflict with that used in this District. The discretion of the District of Columbia Court in deciding that good cause exists will not be overturned. The motion to vacate as to that portion of the order is denied.

D. *Inspection pursuant to Rule 17(c).* The District of Columbia Court ordered the United States Attorney to produce before trial all written statements of the defendant and any statements of witnesses signed or prepared by them, material to the instant charge, in the hands of the United States Attorney. The District Judge relied expressly on *Fryer v. United States*, 207 F. 2d 134 (D. C. Cir. 1953). That case is certainly the law in the District of Columbia Circuit when applied to a capital case, but there is disagreement among the District Judges in the District of Columbia as to its applicability in non-capital cases. See Judge Holtzoff's opinion in *U. S. v. Carter*, 15 F. R. D. 697 (D.C.D.C. 1954). In any event, the *Fryer* case is not the law in this District. *U. S. v. Herzog*, Criminal No. 33968 (N. D. Calif. 1954). The prior order will be vacated. There will be substituted an order directing the United States Attorney to allow prior to trial the inspection of any written, signed statements by the defendant. These are evidentiary. The United States Attorney will be directed to exhibit to defense counsel at the trial after any witness is called and sworn in behalf of the Govern-

ment, any and all written, signed statements previously obtained by the Government from that witness.

The defendant's motion to quash the Government motion to vacate is denied.

The United States Attorney will prepare and submit an appropriate order.

Dated, September 28, 1954.

Edward P. Murphy,
United States District Judge.

United States Court of Appeals
for the Ninth Circuit

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| Hugh Bryson,<br>Appellant,<br>vs.<br>United States of America,<br>Appellee. | Jun. 20, 1955 |

Motion for Reduction of Bail

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Before: Denman, Chief Judge and Bone and Orr, Circuit Judges

Denman, Chief Judge:

Bryson, appellant, moves for a reduction of bail pending appeal from the amount of $50,000 allowed by United States District Judge Mathes acting under Rule 46(a) (2) and (c) of the Federal Rules of Criminal Procedure.

The question before us is whether Judge Mathes abused his discretion in fixing the bail at this high amount. In determining that question we are controlled, as was Judge Mathes, by the provisions of Rule 46, the pertinent portions of which are:

> "(a) (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be al-

lowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice."[1]

* * *

"(c) Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

(A) *The appeal presents a substantial question.*

The Chief Judge is of the view that the indictment charged in count one that Bryson violated 18 U.S.C. 1001 in filing on April 26, 1951, an affidavit required by Section 9(h) of the Labor Management Relations Act of 1947, stating he then and there was not a member of *the* Communist party, whereas he was in fact a member of *the* Communist party. On this charge of membership in some unnamed one of the Communist parties he was acquitted.

Count two charged violation of the above acts by filing an affidavit on April 26, 1951 that he was not an "affiliate of *the* Communist party," whereas he then was an "affiliate of the Communist party." On this last charge he was convicted. It is obvious that the appeal may present several substantial questions. One is to the validity of the indictment with reference to the phrase "*the* Communist party" without the statement of which one of the various communist parties, such as the Communist parties in the

[1]Since we are considering allowing release on bail we must determine the existence of a substantial question.

several states and the Communist party of the United States, was intended. Does such a phrase sufficiently inform one when making the affidavit of the character of the offense and thus comply with the requirement of precision required in drafting a criminal statute?

A Communist party well may seek to establish Marxism socialism, without seeking to overthrow the Government by force, as did the Russian Mensheviks, the second largest party in Russia at the time of the revolution. See American Bar Association circulated Statement on Communism, pages 10 and 18.

Since there may be various Communist parties some of whom do not seek the overthrow of Government by force, must not 9(h) be construed to require that the affidavit deny membership or affiliation in a Communist party "*and* that he does not believe in or teach . . . the overthrow of the United States Government by any illegal or unconstitutional methods", the latter phrase identifying the kind of affiliation in the party which he occupied? Does he violate the Act if his affidavit is not false both as to affiliation and belief?

We are all agreed on the question as to what the words "affiliated with" mean. The definitions of Webster's dictionary of these words are "Intransitive: 1. To connect or associate:—followed by *with*; as, they affiliate with a party. To be friendly, to fraternize. U. S."

If "affiliate with" means "connect with" what are the kinds of connections intended by the statute, which a person must have in mind when he makes his affidavit? Did Congress mean that the affiant, when he made his affidavit, was to consider that he was falsely swearing to lack of

affiliation, if he was merely friendly to the Communist party?

Further, assuming that the phrase "affiliated with" makes the statute one that is enforceable, there arises the question of the instructions given by the court as to the nature of affiliation, which we understood at the hearing on the motion was agreed to present a substantial question.

The judge himself certifies that there is a substantial question and our required determination agrees with his.

B. *The requirement of a bond for $50,000.00 would keep the appellant in jail for many months, perhaps for more than a year.*

The uncontradicted evidence before us is to the effect that Bryson has not the means to raise and cannot raise through his friends a bond for $50,000. Though these facts were before Judge Mathes he nevertheless required that amount and this despite the provision of Rule 46 that he should consider "the financial ability of the defendant to give bail."

This means that unless the bail be reduced Bryson will be confined in jail for the period of his appeal in this court and for the period in which certiorari is sought and granted or denied and if granted until the Supreme Court decision. Since this is a case of first instance and also involves a number of substantial questions, it is quite likely that certiorari may be granted. If it be granted and any of the substantial questions are resolved in favor of Bryson, he will have taken out of his life by imprisonment a period of something like a year at least. In the case of Bridges

v. United States, 346 U. S. 209, in which bail was granted, the notice of appeal was filed in this court on July 6, 1950. The case was decided here against Bridges. Certiorari was granted and the final judgment of reversal by the Supreme Court was made in June 1953. It is thus apparent that, as in that case, a similar period could expire for Bryson and nearly three years could be taken out of his life, that is, nearly three-fifths of his sentence.

As will later appear, such a result would be in complete disregard of the principle established by the Supreme Court in the case of *Hudson v. Parker,* 156 U. S. 277, at page 285:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been judged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

C. *Bryson's likelihood of flight to escape prosecution is but that of the normal case and the bail should be fixed at the usual norm in appeal cases.*

The record shows that the United States Attorney prosecuting Bryson stated at the time of the fixing of bail during appeal by Judge Mathes that no question of Bryson's likely flight was involved. The attorney then was asking for bail of not less than $30,000.00. This statement of the prosecutor of absence of Bryson's likelihood to flee is supported by all the facts before Judge Mathes.

It appears that Bryson has no prior record of convictions of any offenses, felony or misdemeanor. For many

years of his life he was an American merchant seaman, subject to the jurisdiction of the United States Coast Guard; at no time was he ever charged or convicted of any violation of the rules or regulations of the United States Coast Guard. In all respects whatsoever, save and except for the conviction hereinabove mentioned, Bryson's record of conduct has been and is without blemish.

It further appears that Bryson has a home in San Francisco where he is living with his wife and four children, their ages ranging from six to one. The question of his flight to Mexico was raised and his testimony is that he has today no connections with anyone in Mexico and that he had visited Mexico but once in 1951 to see relatives of a former wife. He further testified that he had never been in Canada and has no connections there.

Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person, such elements in his character being required to be considered by the last phrase of 46(c), "the character of the defendant."

That such a man with such chances of a reversal would flee from his home and wife and children, or flee with them, and for the rest of his life be a fugitive from justice, seems less likely than the usual case with the ordinary appellant in a criminal appeal.

The bail is ordered reduced to $20,000.00.

(Endorsed): Opinion on Motion for Reduction of Bail. Filed Jun. 20, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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| Hugh Bryson, Appellant, vs. United States of America, Appellee. | No. 14,859 Nov. 30, 1956 |

Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

Solomon, District Judge:

Hugh Bryson, president of the National Union of Marine Cooks and Stewards, was tried on two counts of an indictment which charged that he filed with the National Labor Relations Board "an affidavit of a non-Communist union officer", in which he falsely alleged that he was "not a member of the Communist Party or affiliated with such Party." He was charged with falsely denying membership in the first count and affiliation in the second count, all in violation of §1001, Title 18, United States Code. The jury acquitted him on the membership count but found him guilty on the affiliation count. From a judgment of conviction and a sentence of five years imprisonment plus a $10,000 fine, Bryson appeals.

As early as 1937, Bryson was an active and militant member of both the Communist Party and the Marine Cooks and Stewards. He frequently caucused with other Communist members of the union for the purpose of influencing the union's meetings, elections and policies. Thereafter, and particularly between 1941 and 1947, the evidence showed that Bryson attended many Communist Party meetings. He solicited new members and participated in the expulsion of old ones. He was a member of the county and state committees of the Party. He acted as chairman of some meetings and gave "educational" talks at others. In one of these talks to new members he stated, "When you are in the Communist Party you accept discipline. You ask no questions . . . for the good of the party you carry out any order that is given to you from the top fraction and you ask no questions."

Bryson's rise in his union was rapid. In 1937, he was a rank and file member of the San Francisco local; in 1947, he became national president of the union.

By 1947, Communist domination of labor unions was recognized as a national problem; for communists in great numbers had infiltrated union organizations not for proper and legitimate union objectives, but for the purpose of engaging in obstructive strikes called by the Communist Party often to support policies of a foreign government.[1] Congress, in an effort to rid unions of communist domination, enacted §9(h) of the Labor Management Relations Act, 1947, 61 Stat. 136, 146, 29 U.S.C.A. §141, 159(h), pop-

[1]For a discussion of the reasons which motivated Congress in enacting the legislation, see *American Communications Assn. v. Douds*, 339 U.S. 382 (1950), particularly pp. 388-389.

ularly called the Taft-Hartley Act. §9(h) provides that no representation cases and no unfair labor charges may be asserted by unions before the National Labor Relations Board until and unless each of their officers file with the Board affidavits that they are not members of or affiliated with the Communist Party or of any other organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. §1001 of Title 18, which provides penalties for false statements, was made applicable to such affidavits.

The Communist Party was concerned over the effect that this law would have on its influence in labor unions. At a meeting held in San Francisco during the summer of 1947 to discuss this problem, Leonard Kaplan, the trade union director of the Communist Party, who presided at the meeting, announced that it would be Party policy for Party members in labor unions to boycott the Taft-Hartley Act for the present, but if rival unions should raid their membership or involve them in jurisdictional disputes, they would resign from the Party in name only but remain in close touch and alliance with the Party. He further stated, "The Communist Party has spent many years in building and training leadership for the more progressive unions on the West Coast and they were not going to sacrifice that overnight by complying with the Taft-Hartley Act."

Bryson stated in reply that he did not see any need to comply with the Act for the present but that an impending struggle between his union and the rival Sailor's Union of the Pacific might make it necessary to file an affidavit at a later time.

Although there was no evidence of Bryson's attendance at Communist Party meetings subsequent to 1947, Clarence Ward, a member of Bryson's union, testified that Bryson urged him to go to Georgia and get signatures for the Progressive Party. He told Ward that the "Progressive Party isn't the Communist Party, but they have a program—the best program and we want to work hand in hand with them. Bryson offered to do things for Ward if he helped the Communist Party get Wallace on the ballot.

Ward also testified that in 1949 he was in an argument with Bryson over whether he would be seated at the union convention and whether he would get his expenses. Bryson told him that he had been given an opportunity to join the Communist Party but, instead, continued to fight the Party.

In the years following the enactment of the Taft-Hartley Act, unions whose officers had signed non-Communist affidavits attempted to take over the membership and job areas of non-qualifying unions. The Marine Cooks and Stewards was being harassed by other unions, particularly by the National Maritime Union. In this effort the other unions were aided by dissatisfied members of the Marine Cooks and Stewards. In April, 1951, and during the course of these struggles, Bryson and the other officers of the union, in order to be able to use the machinery of the National Labor Relations Board to protect the union against these attacks, swore that they were neither members of nor affiliated with the Communist Party.

In July, 1951, John Tiernan was being tried by the Marine Cooks and Stewards on the ground that he was guilty

of dual unionism. After the trial and while he was arguing with Bryson, Tiernan said "The American people are getting sick and tired of the Communist Party and their carryings-on in unions." To this Bryson replied, "If you are referring to me, I'm still a Communist and proud of it."

In the same month, two other union members, Stewart and Whitelaw, came to Bryson's office to ask for job assignment slips. Both of them had been assisting a rival union. As they were waiting to enter Bryson's office, they heard Bryson telephone for assignment slips for two other men who were in his office. However, when Stewart and Whitelaw asked for assignment slips, Bryson told them that he did not issue them. Stewart then called Bryson's attention to the fact that he had just arranged for assignment slips for the other men. When Whitelaw asked what a man had to do to get his job back, Stewart said, "Yes, belong to the Communist Party?" Bryson answered, "That might help." Stewart testified that he then said to Bryson, "Now comes the $64 question, Hugh. Tell me, are you a member of the Communist Party?" To this Bryson answered, "Yes, and I'm proud of it."

In his defense Bryson called 16 witnesses. They testified that Bryson's reputation for truth and veracity was good and that the reputations of the prosecution's witnesses, many of whom harbored deep animosity towards Bryson, were bad. They contradicted witnesses who had placed Bryson at particular Communist Party meetings and who had claimed that Bryson made admissions that he was a member of the Communist Party.

Bryson did not testify.

Bryson's first and principal contention is that the evidence is insufficient to support the jury's verdict that he was affiliated with the Communist Party at the time he filed his non-Communist affidavit.

Before considering that question, we shall first examine his objections to specific portions of the evidence to determine which evidence was properly admitted.

Bryson asks us to disregard as inadmissible hearsay, Leonard Kaplan's statements of Communist Party policy towards the non-Communist affidavit provision of the Taft-Hartley Act made at the Party meeting held in San Francisco in 1947.

These statements were properly admitted on the theory of "testimonial completeness." Bryson's reply to Kaplan becomes understandable only in the light of the statements to which he was replying. Here the principal fact was Bryson's intention as expressed in his reply. Other facts which were necessary to place the principal fact in its true light and which were part of the same transaction were admissible. *Beaver v. Taylor* (1863), 68 U. S. 637.

Irrespective of Bryson's reply, the Government was entitled to prove that it was Communist Party policy for its labor union members to assume a clandestine relationship to the Party in the event it became necessary for them to file non-Communist affidavits. The relevance of this Party policy is manifest. Even apart from its acceptance by Bryson when it was announced at the San Francisco meeting, his proven knowledge of the policy and his strict and unquestioning obedience to Party directive would tend to

show that he did comply with this policy. This, in turn, would tend to explain the absence of evidence of Bryson's active participation in Party functions after 1947, a deficiency which otherwise might be taken to indicate that Bryson had severed his connections with the Party. In fact, it is apparent from this and similar cases[2] that the Party adopted this policy precisely for the purpose of making it difficult to prove the falsity of non-Communist affidavits executed by Party members.

This method of proof, whereby the commission of future acts is inferred from an earlier intent to perform those acts, was sanctioned in the much-cited case of *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285 (1892). Under the rule in that case, proof of intent may be made through declarations and expressions which tend to show present intent, as an exception to the hearsay rule. See also *Mattox v. News Syndicate Co.*, 2 Cir. 1949, 176 F. 2d 897.

The policy of an organization, like the intent of an individual, can only be inferred from the acts and declarations which manifest it. We think that the *Hillmon* state-of-mind exception to the hearsay rule applies to organizations as well as to individuals, and that the policy of an organization, if relevant, may be proved through the declarations of its spokesmen. Leonard Kaplan, the trade union director of the Communist Party, was such a spokesman.

The Government must establish Bryson's affiliation with the Communist Party as of April, 1951, the date of the

[2] *Fisher v. United States*, 9 Cir. 1956, 231 F.2d 99;
*Jencks v. United States*, 5 Cir. 1955, 226 F.2d 540;
*Hupman v. United States*, 6 Cir. 1955, 219 F.2d 243.

affidavit. Although there is substantial evidence of Communist affiliation during earlier periods, the two admissions in July, 1951, are the only proved manifestations that the relationship existed beyond 1949. Bryson addresses three objections to the consideration of this important testimony.

He first contends that the testimony is not credible. He points out that the witnesses to these admissions were his bitter enemies, and he argues that their testimony that he admitted Communist membership to them, within three months after filing with the National Labor Relations Board an affidavit to the contrary, is inherently incredible. He also points out that they did not mention these admissions when they testified about these conversations in prior hearings. Neither did they mention them to the National Maritime Union official for whom they were attempting to enlist members of Bryson's union, even though such information would have been of great value against Bryson and his union.

It was for the jury to evaluate these credibility factors in determining the value of the evidence. Findings of fact by a judge may be reversed where clearly erroneous,[3] but appellate review of jury verdicts has long been limited to the legal sufficiency of the evidence to support the verdict. The weight of the evidence, including all factors of credibility which do not render the testimony incredible as a matter of law is beyond the scope of appellate review of jury verdicts. *Burton v. United States*, 202 U. S. 344 (1906); *Humes v. United States*, 170 U. S. 210 (1898);

[3]Rule 52(a), Federal Rules of Civil Procedure.

*France v. United States*, 164 U. S. 676 (1897). We are unable to reject the challenged testimony on this ground.

Bryson's next ground of attack on the two 1951 admissions is that they were not corroborated by independent evidence. He contends that admissions made subsequent to the commission of the alleged offense must be corroborated.

The requirement for corroboration of admissions by an accused was recently examined by the Supreme Court in *Opper v. United States*, 348 U. S. 84 (1954), and in *Smith v. United States*, 348 U. S. 147 (1954). These decisions extended to admissions the same corroboration requirements which traditionally have applied to confessions. Although both these cases were decided on the same day they apparently disagree on whether corroboration is required for all admissions which are made subsequent to the commission of the alleged offense. The *Opper* case appears to hold that all admissions made after the fact must be corroborated.[4] The *Smith* case suggests that corroboration may not be required in cases other than those in which the admission is made after the fact to an investigating agent on a fact crucial to the Government's case.[5]

The admissions in the present case fall within this area of doubt because they were made after the fact but not to an investigating agent. However, we are not required to decide whether these admissions could stand without corroboration because the record does contain adequate corroborating evidence.

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[4]348 U. S. 84, 90.

[5]348 U. S. 147, 155, Footnote 3.

The *Opper* and *Smith* decisions agree that where corroboration is required, the corroborating evidence need not independently establish the admitted facts. It is sufficient "if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged." *Smith v. United States*, supra, at p. 156.

The reliability of Bryson's admissions in July, 1951, that he was a Communist is greatly increased by the evidence of his active membership and leadership in the Party from 1937 to 1947, the Party policy adopted in 1947 whereby union leaders would drop open ties with the Party so that they could comply with the Taft-Hartley Act while remaining in close touch and alliance with the Party, and Bryson's statements and activities in 1948 and 1949 indicating that he was still working for the Party.[6] This evidence is adequate corroboration for the admissions of Communist Party membership in 1951 within the rule set out in *Opper* and *Smith*.

Bryson's last objection is that the admissions made in 1951 have no probative value and must be disregarded because these admissions, if believed, established membership, and since the jury acquitted him on the membership count they demonstrated their disbelief in this testimony.

The law does not support this contention. A verdict on one count of an indictment cannot have the effect of determining factual issues under another count, even though the same evidence is offered in support of both counts. The legal sufficiency of the evidence to support each verdict

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[6]Statements made in 1948 and 1949 by Bryson, if they constitute admissions, require no corroboration because they were made before the fact. *Warszower v. United States*, 312 U. S. 342 (1941).

must be determined without reference to the other. *Dunn v. United States*, 284 U. S. 390 (1932). Thus the verdict of the jury acquitting Bryson of the charge of falsely denying membership in the Party does not require us to disregard these admissions of membership in determining the sufficiency of the evidence to support the conviction dealing with affiliation.

Having disposed of these objections to specific portions of the evidence, we now turn to the sufficiency of the evidence to sustain the verdict as a matter of law. There is no question about the execution and filing of the affidavit. Our problems lie in the proof of its falsity. We have already detailed the evidence of Bryson's membership and activities in the Party, the leadership which he exercised, his knowledge of the Communist Party policy towards the non-Communist affidavit provisions of the Taft-Hartley Act, his strong belief and obedience to Communist Party directives, and his admissions of Party membership and activities both before and after the dates upon which the affidavit was executed and filed. Although the affidavit was executed two years after and three months before the nearest evidence of Bryson's relationship to the Party, we believe that the evidence as a whole was sufficient to warrant the jury's inference that the relationship continued throughout this interval and existed at the time he executed and filed the non-Communist affidavit.

As we have already pointed out, the absence of evidence on Bryson's active participation in Party functions after 1947 is explained by Party policy which required their union leader members to avoid open participation in Party affairs. Under these circumstances, the evidence of Bry-

son's manifestations of Party membership and activity in 1948, 1949 and 1951, although infrequent, were sufficient to justify the inference that the relationship continued throughout this period.

At the oral argument, Bryson suggested that affiliation could only be proved by overt acts showing his adherence to the illegal and illict objectives of the Communist Party and could not be proved by mere membership in the Party. For this contention he relies on certain language in *Bridges v. Wixon*, 326 U. S. 135, 143 (1945).[7]

Can a person who is proved to have been a member of the Communist Party successfully claim that he was not affiliated with it? To the layman this suggestion would be absurd. The law does not require a different result. The *Wixon* case stated that the term "affiliation" imports less than membership but more than sympathy.[8] Accordingly, proof of membership would establish affiliation a fortiori. Although in the *Wixon* case an immigration statute was being construed, we believe that this reasoning is equally applicable here.

Bryson's next assignment of error concerns the charge to the jury on the proof necessary to establish affiliation.

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[7] "• • • Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."

[8] The instructions of the court on affiliation are as follows:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a

Bryson contends that the court erred in failing to instruct the jury that proof of affiliation must show an adherence to or furtherance of the purposes and objectives of the Communist Party as distinguished from mere cooperation with it in lawful activities.

An instruction to this effect would have been a correct statement of the law.[9] However, Bryson did not request such an instruction or any other instruction on affiliation at the trial stage even when the jurors interrupted their deliberations to request clarification on the definition of affiliation. Under Rule 30, Federal Rules of Criminal Procedure, Bryson's failure to object to the omission of this

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close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"I tried to think of some analogy which would make that possibly clearer to you, and the best one I can think of—we have all in our experience probably heard of a man and woman who live together but are not married. They are husband and wife in everything but name only. You have probably heard that expression. A person to be affiliated with the Communist Party within the meaning of that term as used in the Second Count of the indictment must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member,—in everything but name

* * * *

"If you should find from the evidence that the defendant was a member of the Communist Party or affiliated with it during a period of years prior to April 21, 1951, but if you should also find that the evidence does not satisfy you beyond a reasonable doubt that such membership or affiliation continued to and including the 21st day of April, 1951, then it is your duty to acquit the defendant."

[9] *Bridges v. Wixon*, supra, 143-4.

instruction at the trial level precludes him from raising it on appeal.

If we are to consider this assignment, we must do so on our own motion under Rule 52(b), Federal Rules of Criminal Procedure, after finding that the omission may have resulted in a miscarriage of justice or denied Bryson a fair trial.[10] There is no basis for such a finding.

The instructions on the question of affiliation were full and complete. They adequately informed the jury of the meaning of the term and provided an adequate standard for evaluating the evidence. By likening affiliation to membership in everything but name, they benefited Bryson by requiring a higher standard of proof than was required under *Bridges v. Wixon*, supra, the case upon which Bryson relies. Membership imports adherence to the objectives of the Party, and therefore the instructions as given excluded the possibility that Bryson could be convicted on the affiliation count merely on proof that he cooperated with the Party in lawful activities, the danger which Bryson's present proposal is calculated to prevent.

It is true that the jury requested clarification of these instructions and that the request was denied. However, although the jury was told to renew this request if additional discussion failed to resolve their difficulties, they proceeded to verdict without making any further request.

The instructions on affiliation were adequate and certainly not erroneous, particularly in the absence of a timely request by Bryson for further amplification.

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[10] *Herzog v. United States*, 9 Cir. (on rehearing), 235 F.2d 664, 666-667 (1956); original opinion 226 F.2d 561 (1955).

In his last specification of error, Bryson claims that the trial court erred in prohibiting communication with members of the jury.

Immediately prior to the receipt of the verdict, the trial judge forbade everyone from communicating with any member of the jury without his permission. Despite this order, a newspaper reporter contacted jurors and reported that at least two of them expressed uncertainty as to the meaning of "affiliation." Based upon this report, Bryson asked to be relieved of the order so that he could interrogate the jurors on this subject. After a hearing, the court denied his application.

There was no impropriety in the court's original order prohibiting communicating with the jurors. In view of the nature and length of the trial and the wide publicity it received, the order was not only proper but was highly desirable.

This and other courts[11] have condemned the practice of interviewing jurors on the course of their deliberations in the jury room. It is incumbent upon the courts to protect jurors from the annoyance and harassment of such conduct. The order by the Honorable William Mathes, the able and experienced trial judge, was designed to accomplish that purpose and was proper.

Although interrogation of jurors may be prohibited as a general rule, it is permitted when there is some indication that grounds for impeachment of their verdict may be dis-

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[11] *Northern Pacific Railway Co. v. Mely*, 9 Cir. 1954, 219 F.2d 199, 201; *Rakes v. United States*, 4 Cir. 1948, 169 F.2d 739, 745, see also The American Bar Association Committee on Professional Ethics, Opinion 109, issued March 10, 1934.

closed thereby.[12] However, even if Bryson's interrogation had disclosed that the jurors had not understood the meaning of affiliation as it was defined by the court, such testimony could not be used to impeach the verdict since it dealt with a matter which inhered therein. *Young v. United States*, 10 Cir. 1947, 163 F. 2d 187, 188, cert. denied 332 U. S. 770 (1947). The denial of Bryson's request to be relieved of the original order was also proper.

Affirmed.

(Endorsed): Opinion. Filed Nov. 30, 1956.
Paul P. O'Brien, Clerk.

[12] *Mattox v. United States*, 146 U. S. 140 (1892).

United States Court of Appeals
for the Ninth Circuit

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| | |
|---|---|
| Hugh Bryson, Appellant, vs. United States of America, Appellee. | No. 14,859 Apr. 12, 1957 |

On Petition for Rehearing

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Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

Solomon, District Judge:

Bryson, in his petition for rehearing, contends that the instruction on affiliation was fatally defective and that our decision to the contrary is inconsistent with our decision in *Fisher v. United States*, 231 F. 2d 99 (1956). We find no inconsistency.

In evaluating the instructions on affiliation, we, as well as the court in the *Fisher* case, used the test stated in *Bridges v. Wixon*, 326 U. S. 135, 143 (1945). In that case, the Supreme Court declared that proof of affiliation must show an adherence to or a furtherance of the purposes and objectives of the Communist Party; as distinguished from mere cooperation with it in lawful activities.

In the *Fisher* case, the instruction defined affiliation as follows: "To connect or associate one's self with; to

adopt, hence usually to bring or receive into close connection; to ally." The court recognized that this instruction did not exclude the possibility that Fisher might have been convicted without proof that he adhered to the purposes of the Party. The conviction was therefore reversed.

In this case, the trial court instructed the jury that "A person to be affiliated with the Communist Party . . . must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member—in everything but name." We think it self-evident, and Bryson himself all but concedes, that a member can be regarded as adhering generally to the purposes of his organization so as to satisfy the requirement of *Bridges v. Wixon*, supra. The limitation of affiliation to membership in everything but name provides the essential element which was lacking in the Fisher instruction.

In our original opinion, we considered the use in the trial court of evidence of Bryson's lawful political activities.[1] He claims that this amounts to punishment for engaging in lawful activities protected by the First Amendment.

The act under which he was charged does not punish political activities since it deals solely with false swearing.[2] Bryson was privileged to urge people to get signatures for the Progressive Party, but he had no constitutional right to lie about his connections with the Communist Party.

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[1] See *Bryson v. U. S.*, 238 F.2d 657 at 660.

[2] The indirect effects of the affidavit requirement in restraining political freedom were considered and held constitutional in *American Communications Association v. Douds*, 339 U.S. 382 (1950).

In essence, Bryson's argument is that no evidence of lawful conduct is admissible to prove a crime. This contention is patently without merit.

Bryson next contends that the Government must show that he was an active affiliate of the Communist Party on the date of his affidavit in order to punish him for falsely swearing that he was not so affiliated.[3] He cites as persuasive on this point a concession by a Government attorney, made during an oral argument in a Smith Act prosecution, that a person could not constitutionally be convicted under that law for inactive membership, even though membership under that law is an offense.[4] We do not decide the proposition as applied to the Smith Act,[5] but we are agreed that it has no merit as applied to §9(h) of Taft-Hartley.

The important difference between the two laws is that the Taft-Hartley Act, unlike the Smith Act, does not proscribe political affiliations or activities. It merely pro-

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[3]In support of this contention, Bryson cites as authority what he states to be a holding in *American Communications Association v. Douds*, supra, which in his petition for rehearing reads as follows:

"Before there can be a 'successful prosecution for false swearing' there must be proof of 'overt acts . . . done with knowledge that they contravene the statute.' (339 U.S. at 411-413)"

We have carefully examined this opinion, and we are convinced that it contains no such holding. We do not commend the practice employed by Bryson of presenting as a single quotation, material taken from portions of an opinion so widely separated that the three-dot symbol of omitted material represents two pages of text and a major subject matter division. While the construction of quotations necessarily involves discretion, the quoted material should fairly represent both the language of the original text and its meaning. Bryson's quotation meets neither test.

[4]Report of argument in *Scales v. United States* and *Lightfoot v. United States*, 25 U.S. Law. Week 3110.

[5]18 U.S.C.A. §2385.

scribes false swearing. Affiliation is a relationship which can exist even when not manifested by activity. It is a fact capable of being known, misrepresented and proved. We believe that the evidence of Bryson's connections with the Communist Party, both before and after the date of the affidavit, afforded an adequate basis from which the jury could properly infer that Bryson was affiliated with the Party at the time he executed his affidavit and that he knowingly falsified such relationship in this affidavis. Neither the Constitution nor §9(h) of the Taft-Hartley Act requires anything more.

Bryson also contends that the term "affiliation" as used in this statute is so vague that it violates the constitutional requirement of certainty in criminal legislation. *American Communications Association v. Douds*, supra, at p. 412, provides the answer to this argument. The court there stated that an abstract definition of affiliation which would eliminate all cases of doubt is not required in order to avoid the objection of vagueness. What is required is that the false statement shall have been made with knowledge that it was in violation of the statute. In this case, Bryson was found to have denied that he was affiliated with the Communist Party at a time when he was a member of the Party in everything but name. We think that a person who is a member in everything but name could not honestly and without taint swear that he was not affiliated with the Party. §9(h), as applied in this case, was not unconstitutionally vague according to that standard.

Bryson objects to our conclusion that the trial court properly admitted statements by the trade union director of the Communist Party concerning the Party's policy

towards the non-Communist affidavit provisions of the Taft-Hartley Act made at a Party meeting attended by Bryson.

We found that such testimony was admissible on the theory of testimonial completeness. We also found that it was within the state-of-mind exception to the hearsay rule.

Bryson claims that our analysis of the testimony as being within the state-of-mind exception to the hearsay rule was not only incorrect but also unfair, since the theory and two of the cases cited by us on this point had not been suggested in the briefs.

It would accomplish little to re-examine our analysis on this point since Bryson makes no objection to our holding that the testimony was admissible on the theory of testimonial completeness.

We have carefully examined each of Bryson's other contentions and find all of them without merit. The petition for rehearing and the application for a rehearing *en banc*, which we treat as a suggestion under our Rule 23, are denied.

(Endorsed): Opinion on petition for rehearing. Filed Apr. 12, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 14,859

Hugh Bryson,
Appellant,

vs.

United States of America,
Appellee.

## JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered November 30, 1956.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

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Excerpt from Proceedings of Friday, April 12, 1957.

Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING

Ordered that the typewritten opinion on petition for rehearing this day rendered by this Court in above cause be forthwith filed by the Clerk.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1957

No. 171

HUGH BRYSON,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## REPLY BRIEF FOR PETITIONER.

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# In the Supreme Court
OF THE
# United States

October Term, 1957

No. 171

| | |
|---|---|
| Hugh Bryson, | *Petitioner,* |
| vs. | |
| United States of America, | *Respondent.* |

## REPLY BRIEF FOR PETITIONER.

In its Brief in Opposition ("Br."), the Government does not assert that the Petition for Certiorari ("Pet.") does not raise important questions of federal law which ought to be decided by this Court (Supreme Court Rule 19[1][b].) Indeed, it could hardly do so in view of its earlier position in *Jencks v. United States*, 353 U.S. 657, that these identical questions required decision there even though other grounds for disposition of the case were available.[1]

[1] See Government's Supplemental Memorandum in *Jencks v. United States*, No. 23, October Term 1956 (Pet. 16, n. 19).

Nor does the Government take issue with Mr. Justice Clark's statement, made in that case, that the important question of what, under the Taft-Hartley Law, constitutes "affiliation" with the Communist Party is as yet unresolved:

> "The Court is sorely divided on this important issue and proper judicial administration requires that charges as to what constitutes membership and affiliation in the Communist Party be announced" (353 U.S. at 684).[2]

Since the questions presented are both important and undecided, it is difficult to understand how the Government can seriously oppose the granting of the writ here. In view of the pendency of other cases presenting similar issues (see Mr. Justice Clark's opinions in both *Gold* and *Joncks*, *supra*), these important and unresolved questions are bound to recur. This case presents the opportunity of disposing of them before they reach this level again.

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## 1. THE UNCONSTITUTIONAL APPLICATION OF THE TERM "AFFILIATED" IN THE INSTANT CASE.

(a) The Government does not argue that illegality of purpose is not a constituent element of the relationship of affiliation. Indeed, it could hardly do so in the face of the explicit language of this Court in *Bridges v. Wixon*, 326 U.S. 135 at 143-144:

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[2] In an earlier case, Mr. Justice Clark had remarked upon the failure of the court to settle this and related important questions (*Gold v. United States*, 352 U.S. 985 at 986).

". . . he who cooperates with such an organization only in its wholly lawful activities cannot by that fact be said as a matter of law to be 'affiliated' with it. Nor is it conclusive that the cooperation was more than intermittent and showed a rather consistent course of conduct. . . . Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities."

Rather, it asserts that petitioner's reliance on the *Wixon* definition is based upon a "mistaken analogy" between the statute involved in that case (18 USC, 1940 ed., 137), and the one here involved (§9[h] of the Taft-Hartley Law). It is difficult to understand that position, for the respective statutes read in pertinent part as follows:

| 8 U.S.C., 1940 ed., 137. | Section 9(h). |
|---|---|
| ". . . members of or affiliated with any organization . . . that . . . advocates . . . overthrow by force and violence of the Government of the United States." | ". . . a member of the Communist Party or affiliated with such party . . ." |

Whatever the meaning of the word "affiliated", it is obviously the same in both statutes. The only difference is that the earlier statute *describes* the proscribed organization, whereas Section 9(h) *names* it. In each case, however, the statute denounces the same relationships and there is no basis for the view that the nature and character of the relationship of "affiliation" is any different under the more recent statute than it was under the earlier one. The most that Congress has done in Sec-

tion 9(h) is to dispense with the need for proof in every case of the Party's advocacy of forcible overthrow. *Cf. Galvan v. Press*, 347 U.S. 522, 529. However, this does not dispense with the necessity for proof that the individual was "*affiliated*" with the organization, rather than that he sustained some other relationship to it.

The use of the term "affiliated" in Section 9(h) only two years after *Wixon* had construed it as requiring proof of a connection for unlawful purposes, coupled with the fact that changes were made in other respects in this and comparable statutes (e.g., the change which dispensed with the necessity for proof of the Party's doctrine), is a clear indication of a legislative adoption of this Court's construction of that term, and may be taken as a deliberate refusal to amend or modify it. Cf. *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295; *Jaines v. Patterson*, 274 U.S. 544; *National Labor Relations Board v. Gullett Gin Company*, 340 U.S. 361; *United States v. Williams*, 341 U.S. 70.

The *Wixon* definition of "affiliated" contains *two* concepts: (a) cooperation on a fairly permanent basis, and (b) cooperation in furtherance of unlawful objectives. The Government's argument that only the first half of this definition is applicable to this case, is untenable and should be rejected by this Court.[3]

[3]We do not believe, as the Government in effect argues (Br. 10-11), that by their concurrences in *Jencks v. United States*, 353 U.S. 657, Justices Burton, Harlan and Frankfurter intended *sub silencio* to revise the Wixon definition of affiliation and to approve, for a criminal case, the elimination of the requirement that to constitute affiliation the connection must be for an unlawful purpose. Certainly nothing in their opinions suggests any such thing; on the contrary, the *Wixon* opinion is cited with approval (353 U.S. at 680, n. 10).

The Government's position nowhere considers the serious constitutional questions posed by its construction of the statute (Pet. 24-26). A criminal statute authorizing conviction for cooperation with the Communist Party to attain exclusively lawful objectives, is obviously bad when measured against the requirements of the First Amendment, even if that cooperation is "on a fairly permanent basis". Under the protections afforded by the amendment, one might cooperate quite consistently with the Communist Party in an effort to procure the passage of fair employment legislation, for example, and still not be subject to prosecution as an "affiliate" thereof. *Schneiderman v. United States*, 321 U.S. 118; *Cf. DeJonge v. Oregon*, 299 U.S. 351; *Herndon v. Lowry*, 301 U.S. 242; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Konigsberg v. State Bar*, 353 U.S. 252.[4]

*Galvan v. Press*, 347 U.S. 522, does not, as the Government seems to think (Br. 9-10), require a different result, since there the court was concerned (at 531) only with "[p]olicies pertaining to the entry of aliens and their right to remain here" after proof that the had been "members" of the Party. It never intimated that the result if there reached would obtain in a case involving the constitutional rights of a citizen in a criminal proceeding based upon a charge of "affiliation."

The Government's argument, that the provisions of Rule 30, F. R. Crim. P. preclude the petitioner from raising the issue, neglects to recognize: (1) that the *Wixon* case was

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[4]Indeed, one might even be a member or officer of the Party without necessarily committing an unlawful act (cf. *Yates v. United States*, 354 U.S. 298).

repeatedly called to the attention of the trial court (Pet. 26, n. 31), and that the record here shows more than substantial compliance with the rule; and (2) that under Rule 52(b) F. R. Crim. P. this Court has inherent power to inquire into the adequacy of a charge in a case where there is grave error which may amount to a denial of a fundamental right of the accused. *United States v. Atkinson*, 297 U.S. 157; *Morris v. United States*, 156 F.2d 525 (9 Cir., 1946); *United States v. Balodimas*, 177 F.2d 485 (7 Cir., 1949); cf. *Fischer v. United States*, 212 F.2d 444, 444 (10 Cir., 1954); *United States v. Kelinson*, 205 F.2d 600 (2 Cir., 1953). Rule 52(b) is particularly applicable in view of the harshness of the sentence here imposed. *United States v. Trupiac*, 136 F.2d 900 (2 Cir., 1943).

In any case, the court below, both in its original opinion (Pet. App. 42) and on rehearing (Pet. App. 45-46) considered the claim on the merits and rejected it. Its opinions, erroneous in the respects pointed out, will therefore stand as a statement of the law unless corrected by this Court.

Finally, Rule 30, if it applies at all, applies only to claimed errors in the instructions. It does not operate to prevent an appellate court in a criminal case from examining the record to determine whether in other respects—e.g., the sufficiency of the evidence—the statute was unconstitutionally applied to the defendant. This Court has never hesitated to examine a record for this purpose (*Mortenson v. United States*, 322 U.S. 369 at 374), particularly in cases involving claimed violations of First Amendment rights (*Hartzel v. United States*, 322 U.S. 680; *Yates v. United States*, 354 U.S. 298).

(b) The Government's statement that the evidence shows petitioner's "close ties with the Communist Party and adherence to its doctrines both before and after the execution of the affidavit" (Br. 12) is palpably incorrect. Even the court below remarked on the "absence of evidence" of petitioner's participation in party affairs after 1947 (238 F.2d 661; Pet. App. 35).

There is no evidence in this record, even as summarized by the Government (Br. 5-8), that after 1947 petitioner had "close ties" or even a single contact with the Communist Party. The only evidence of petitioner's "ties" after 1947 reveals an interest in the affairs of the Progressive Party (Br. 7); this cannot, particularly after the decision of this Court in *Sweezy v. New Hampshire*, 354 U.S. 234, especially at 242, 245, 266, be regarded as evidence of Communist Party affiliation.

As to adherence to doctrine, the record is equally devoid of evidence relating to the period after 1947. Indeed, one examines the record, the opinions below, and the Government's summary of the evidence in vain to determine of just what doctrines the Government speaks. The trial court recognized that there was no evidence in this case dealing with the doctrines of the Communist Party (R. 1085-J) and observed that on the proof here adduced, the jury could have found the party to have been "a sewing circle or a social club of some kind" (R. 900-G). The Government failed to prove which, if any, "doctrines" petitioner was supposed to have adhered to even before 1947, much less after that date; it certainly did not prove adherence to unlawful "doctrines." Consequently, entirely

apart from the matter of the erroneous instruction, the conviction violated petitioner's First Amendment rights.

We have already shown (Pet. 23), and drawn no response from the Government, that there is not a scintilla of evidence to justify a finding that after 1947 petitioner had any connection with the party, much less a "close alliance" with it. The Government nonetheless continues to rely upon non-existent evidence to support an "inference" which it says the jury "presumably" drew (Br. 13) that petitioner was affiliated with the party four years after the date of his last contact with it. However, due process demands that there be a rational connection between the evidence adduced and the conclusions which are drawn therefrom, and an inference as irrational as the one the Government here proposes, raises constitutional questions under the Fifth Amendment. *Tot v. United States*, 319 U.S. 463; *Mortensen v. United States*, 322 U.S. 369; *Morissette v. United States*, 342 U.S. 246.[5]

[5]In any case, constitutional considerations aside, the four-year gap in the evidence destroys the Government's case, for here, unlike *Jencks*, there is no evidence showing that the party kept no membership records or arranged special clandestine meetings of important party officials or that no disciplinary action was taken against petitioner or that he was not replaced in a party position (*Jencks v. United States*, 353 U.S. 657, at 659-660, 662). Nor does the holding in *Hupman v. United States*, 219 F.2d 243 (6 Cir., 1955), cert. den. 349 U.S. 953, relied upon by the Government (Br. 13-14), indicate a contrary result. There appellant received specific "instructions" to conceal his membership in the party while "maintaining connection with and giving support to" it. Here there is no evidence either of the maintenance of a connection with the party or of the giving of support to it subsequent to 1947. Whatever may be one's views about the Party generally, it is upon the evidence in the record that the issues here presented must be decided. *Yates v. United States*, 354 U.S. 298 at 330.

(c) What has been said disposes, we think, of the Government's contention that because this Court said, in *American Communications Assn. v. Douds*, 339 U.S. 382 at 412-413, that "no honest, untainted interpretation" of the term "affiliated" is punishable, the term is not too vague to warrant a conviction. The Government's argument (Br. 14) begs the question because it assumes that there can be only *one* honest interpretation of the term—the one urged by the Government. The fact is that on the evidence here petitioner could have had, and for all that the Government proved did have, an honest, untainted interpretation of the term consistent with non-affiliation when he signed the affidavit in 1951. He was convicted because a jury had a different interpretation—perhaps equally honest and untainted—of the term. The fact that this occurred points up the vagueness of the statute upon which the Government procured this conviction.

(d) The argument (Br. 15) that the witness Whitelaw related the alleged 1951 admission to the Federal Bureau of Investigation on August 6, 1951, is directly contrary to the testimony given by this witness in a Federal court proceeding on October 18, 1951. On that occasion he swore that he had never before told "anybody" that such a conversation had occurred (R. 606). Whether the witness' entire testimony is thereby "tainted" within the meaning of *United States v. Mesarosh*, 352 U.S. 1, may be an open question, but the Government's ignoring of this flagrant contradiction in the testimony of one of its key witnesses is too obvious to be overlooked here.

While *Opper v. United States*, 348 U.S. 84, and *Smith v. United States*, 348 U.S. 147, did in fact involve extra-

judicial admissions made to law enforcement officers, they did not, as the Government suggests (Br. 15), imply that this narrow fact is the basis for the rule that such admissions must be adequately corroborated. *Smith* stresses (348 U.S. at 155) that any admission of "importance" should not go uncorroborated; and *Opper* points out that not only the over-zealousness of law enforcement agents, but also "the maliciousness of an enemy . . . may tinge or warp the facts of a confession" (348 U.S. at 89-90). There is no reason for limiting the rule requiring corroboration in the manner suggested by the Government.

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**2. THE INADMISSIBILITY OF THE HEARSAY TESTIMONY.**

The Government argues that the admittedly hearsay testimony (vital to its case as the basis for the argument that there was a party "policy" to file false affidavits) is admissible on the theory of "testimonial completeness" (Br. 18). It ignores the fact, however, that the "principal fact" which may be thus "illuminated" was not petitioner's state of mind in 1947, but his state of mind when he filed the affidavit in 1951, four years later. We have already considered *Beaver v. Taylor*, 68 U.S. 637, and shown its inapplicability to the case at bar (Pet. 30). Neither *Bruce v. United States*, 73 F.2d 972 (8 Cir., 1934), nor *Stockman v. United States*, 8 F.2d 211 (9 Cir., 1925), also cited by the Government (Br. 18), support the Government on this point. *Bruce* was a prosecution for illegally transporting a motor vehicle in interstate commerce. The challenged evidence had to do with checks given to service stations in payment for gasoline purchased *on*

*the very trip* involved in the prosecution, and revealed "circumstances [which were] all closely connected with the transportation of the car" (73 F.2d at 974). *Stockman* was a prosecution for the maintenance of a nuisance between December of 1923 and June of 1924. The challenged evidence was a conversation respecting illegal liquor sales in May of 1924—squarely within the period charged in the information. It was held to be admissible because it was "contemporaneous with the facts in controversy" (8 F.2d at 212).[6]

In no case cited by the Government has hearsay testimony *four years old* been held admissible to prove a crime. This 1947 hearsay testimony, so vital to the Government's case, was improperly admitted since it could not possibly prove petitioner's state of mind in 1951.

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### 3. THE TWO-WITNESS PERJURY RULE.

For the reasons already asserted (supra, pp. 5-6), we believe that the Government's reliance (Br. 19) on F.R. Crim. P. 30 to foreclose review by this Court of the applicability of the two-witness perjury rule to a prosecution under the false statements statute, is misplaced. As to the importance of the question, we call attention to Mr. Justice Clark's observations in *Gold v. United States*, 352 U.S. 985 at 986. On the merits, we reiterate what we have already said (Pet. 33-35) and, following the Government's lead, respectfully refer the court to the brief

[6] Actually, the discussion of this evidence was dicta for, as the court noted (8 F.2d at 212), the defendant was *acquitted* of this particular charge.

on the merits filed by the petitioner in *Gold v. United States, supra,* No. 137 October Term, 1956, pp. 38-47.

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4. THE PROHIBITION AGAINST POST-VERDICT INQUIRY.

As to the injunction against communicating with jurors after the verdict, the Government argues (Br. 20) that "ordinarily" a juror may not be heard to impeach a verdict. But it fails to recognize that this Court has frequently permitted evidence to be received from jurors to determine the existence of extraneous influences which improperly influenced a verdict. The cases cited in the Petition (p. 37), which establish this proposition,[7] are not even mentioned in the Government's brief.

In any case, the Government does not meet the argument that petitioner should not have been deprived by an order, which it has already conceded was of doubtful propriety (R. 1215-1216; and see Pet. 36, n. 38), of the opportunity of ascertaining the facts so that he might make a showing to obtain appropriate relief (Cf. *Remmer v. United States,* 347 U.S. 227).

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CONCLUSION.

This case presents questions of obvious importance and significance to the administration of criminal law in the Federal courts generally, and to the enforcement and application of the "affiliation" provisions of the Taft-

[7] *Mattox v. United States,* 146 U.S. 140; *Holmgren v. United States,* 217 U.S. 507; *Hendrix v. United States,* 219 U.S. 579; and *Woodward v. Leavitt,* 107 Mass. 453.

Hartley Law specifically. It presents issues which have heretofore been accepted for review by this Court but which, for one reason or another, have not yet been decided. These issues are present not only here, but in cases "pending in various districts throughout the country".[8] This Court should issue the writ to review and resolve these questions.

Dated, San Francisco, California,
September 4, 1957.

Respectfully submitted,

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NORMAN LEONARD,
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[8] Mr. Justice Clark, in *Gold v. United States*, 352 U.S. 985 at 986, and in *Jencks v. United States*, 353 U.S. 657 at 684.

No. 1005

# In the Supreme Court of the United States

OCTOBER TERM, 1956

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HUGH BRYSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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No. 1065

HUGH BRYSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The principal opinion of the Court of Appeals (Pet. App. 29-44) is reported at 238 F. 2d 657. The Court of Appeals' opinion in connection with its denial of a petition for rehearing (Pet. App. 45-49) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1956 (Pet. App. 50). A petition for rehearing was denied on April 12, 1957 (Pet.

App. 45-49). On May 3, 1957, Mr. Justice Douglas entered an order extending the time for filing a petition for a writ of certiorari to June 7, 1957, and the petition was filed on June 6, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the term "affiliated," as used in § 9(h) of the National Labor Relations Act as amended, was unconstitutionally applied to petitioner's prosecution for filing a false affidavit of non-affiliation with the Communist Party, on the grounds that—

(*a*). the jury was not required to find that petitioner was affiliated with the Party, on the date of his affidavit, "for illegal purposes";

(*b*). petitioner's conviction was, allegedly, based in substance on nothing more than his activity in the Communist Party prior to the date of his affidavit;

(*c*). the word "affiliated" is too vague a term to warrant a conviction for false denial of affiliation; and

(*d*). it was "improbable" that petitioner made the post-affidavit admissions which the Government's witnesses attributed to him, and, further, that the admissions are said to lack the "corroboration" which they allegedly required.

2. Whether statements by another than petitioner, made in the course of a discussion in which petitioner also participated, were properly received in evidence for the purpose of showing the context in which

petitioner's statements were made and their meaning.

3. Whether the "two witnesses" perjury rule applies to a prosecution under the "false statements" statute for filing a false non-Communist affidavit.

4. Whether, in the circumstances of this case, the trial court abused its discretion in refusing to permit petitioner to communicate with the members of the jury, following their verdict, as to whether they understood the meaning of "affiliation" and how they arrived at their verdict.

## STATUTES AND RULE INVOLVED

The pertinent provisions of 18 U.S.C. 1001 and of § 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), are set forth at pp. 5-6 of the petition for certiorari. Rule 30 of the Federal Rules of Criminal Procedure provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

## STATEMENT

Count 2 of a three-count indictment filed October 12, 1953, in the United States District Court for the District of Columbia, charged that petitioner, on or about April 26, 1951, filed with the National Labor Relations Board a false affidavit attesting that he was not affiliated with the Communist Party, in violation of 18 U.S.C. 1001 and § 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159 (h)) (see Pet. 5-6). Upon motion by petitioner, filed pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, the case was transferred for trial to the Northern District of California. Following a trial by jury, petitioner was found guilty on count 2 [1] and was sentenced to imprisonment for five years and to pay a fine of $10,000 (R. 1182, 1375-1376). On appeal to the Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed.

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[1] Petitioner was acquitted on the first count, charging a false denial that he was a *member* of the Communist Party (R. 1182). The third count, which charged a false denial that petitioner *supported* an organization which taught and advocated the violent overthrow of the Government, had previously been dismissed on motion of the Government.

The evidence adduced by the Government may be summarized as follows:

Petitioner, who at the time of his indictment was National President of the Marine Cooks and Stewards Union (R. 799), had been associated with the Communist Party since at least as long ago as 1936 or 1937. At that time, as a young member of his Union, he was a militant Party member, who would confessedly, in the words of one witness, have "eliminated" his "father and mother * * * for the good of the Soviet Union" (R. 64-65). He was intent upon developing Communist control over the labor union he was later to lead (R. 63-64). During the period from 1941 to 1947, petitioner participated in numerous Communist Party meetings (R. 190, 194, 195, 198, 202-204, 207, 214, 215-216, 303-312, 393-394, 488, 496, 497). He served on the Executive Board of a Communist Party cell as early as 1941 (R. 393-394) and at various times thereafter (R. 202-204, 207). From 1945 to 1947, he participated in Party meetings on the county level (R. 214, 215-216, 497). In these county meetings, he acted as chairman (R. 198), gave "educational" talks (R. 196), participated in the expulsion of Party members (R. 205-208), and solicited new members (R. 303-312, 372-374). In 1946, he was introduced at a Party meeting as a member of the Party's (California) State and (San Francisco) County Committees (R. 493).

In June 1947, Congress passed the Taft-Hartley

(Labor Management Relations) Act (61 Stat. 136), one of the provisions of which—the provision here involved[2]—restricts the enjoyment of certain designated advantages under the National Labor Relations Act to labor unions whose officers file with the National Labor Relations Board affidavits attesting, *inter alia*, that they are not members of or affiliated with the Communist Party.

During the summer of 1947, petitioner attended a Party meeting presided over by Leonard Kaplan, Trade Union Director of the Communist Party (R. 497-506). At this meeting, Kaplan announced that the Party's policy with respect to the affidavits was that Party members would, at that time, "boycott" the Taft-Hartley Act, but that (R. 504),

> if such occasion arose where Dave Beck of the Teamsters Union and Harry Lundeberg of the Sailors' Union started chopping off their membership and tying them up in jurisdictional disputes, to save the organizations they would have to comply with the Act, and it would be understood that they would resign from the party in name only, so that they could comply, but this did not mean they would not be in touch, in close alliance with the party; they would still be informed of all major decisions and policies of the party.

Kaplan further declared that the Communist Party "had spent many years in building and training

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[2] § 101, adding § 9(h) to the National Labor Relations Act (61 Stat. 136, 146; 29 U.S.C. 159(h)).

leadership for the more progressive unions on the West Coast and they were not going to sacrifice that overnight by complying with the Taft-Hartley Act" (R. 506). Petitioner personally participated in these discussions. He stated that, while he "was being faced with a terrific struggle on the waterfront" with Lundeberg of the Sailors Union, he "saw no present need for complying with the provisions of the Taft-Hartley Act"; but that "at a later date it may prove necessary to file an affidavit" (R. 503).

In 1948, petitioner solicited witness Clarence Ward to "go to Georgia and help to get signatures for the Progressive Party." Asked by Ward whether the Progressive Party "was * * * the Communist Party," petitioner replied, "No, it isn't—the Progressive Party isn't the Communist Party, but they have * * * the best program and we want to work hand and hand with them * * *." He further promised Ward that if the latter procured the signatures and got the Progressive Party on the ballot, "then we will be able to do things for you" (R. 314).

In 1949, petitioner refused to seat Ward as a delegate to the Marine Cooks and Stewards Union convention. Petitioner told Ward: "We have been trying to do the best we can for you, but you keep fighting us." When asked what he meant by "us," petitioner said, "You [were] given the chance to come into the Communist Party and you didn't come * * *. You won't be seated in the convention * * *" (R. 318; see also R. 303-312).

In the spring of 1951, the Marine Cooks and Stewards Union, of which petitioner was then the National President, was being subjected to membership raids by, and was engaged in jurisdictional disputes with, the rival National Maritime Union (R. 932, 934, 937-939). On April 26, 1951, petitioner caused to be filed with the National Labor Relations Board the "Non-communist Affidavit" here in issue, in which he swore, *inter alia*, that he was not a member of or affiliated with the Communist Party.

In July 1951, some two and one-half months after the filing of this affidavit, witness Tiernan had occasion to state to petitioner that "[t]he American people are getting sick and tired of the Communist Party and their carryings-on in unions," to which petitioner retorted, "If you are referring to me, I am still a Communist and proud of it" (R. 697).

On another occasion in this same month, July 1951, one Stewart, a member of the Marine Cooks and Stewards Union, had occasion to ask petitioner whether he was "a member of the Communist Party," to which petitioner replied, "Yes, and I am proud of it" (R. 557). This incident was testified to by one Whitelaw (R. 648), who was also present, as well as by Stewart (R. 557).

## ARGUMENT

1. Petitioner contends that the statutory term "affiliated" was unconstitutionally applied to his case in several respects (Pet. 17-28).

(*a*): It is argued (Pet. 25-28) that the Govern-

ment was required to prove that petitioner was affiliated with the Communist Party "for illegal purposes" (Pet. 25) in order to establish that he falsely swore in his non-Communist affidavit that he was not affiliated with that organization. This contention is based upon a mistaken analogy between the statute involved in *Bridges* v. *Wixon*, 326 U.S. 135, and §9(h) of the amended National Labor Relations Act, the provision at bar (Pet. 25).

The statute in *Bridges* v. *Wixon*[3] applied to aliens shown to be members of or affiliated with "any organization * * * that" advocates forcible overthrow of the Government. The Communist Party was not mentioned. Section 9(h) of the amended National Labor Relations Act, on the other hand, refers to the Communist Party by name. It denies the machinery of the Labor Board to unions whose officers have failed to file affidavits attesting that they are not members of or affiliated with "the Communist Party." The *Bridges* holding—that the act or acts tending to prove "affiliation" within the meaning of the statute there involved must be of such a quality as to indicate an adherence to or furtherance of the unlawful purposes and objectives of the organization in question (326 U.S. at 143-144)—is thus inapposite to the construction of a statute like the present one.

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[3] 8 U.S.C. (1940 ed.) 137, providing for the deportation of aliens "who are members of or affiliated with any organization * * * that * * * advocates * * * the overthrow by force or violence of the Government of the United States * * *".

Cf. *Galvan* v. *Press*, 347 U.S. 522, 529. All that is required to be proved in a prosecution under 18 U.S.C. 1001 for falsely denying affiliation with the Communist Party in a § 9(h) affidavit is that the affiant knowingly and willfully swore falsely that he was not affiliated with that organization on the date in question. *American Communications Association* v. *Douds*, 339 U.S. 382, 412-413.

Except with respect to the absence of any requirement of adhesion to the "unlawful purposes" of the Communist Party, the trial court's instructions as to the meaning of "affiliation" (see R. 1138-P) came, as petitioner concedes, "almost verbatim out of the *Wixon* opinion" (Pet. 26, fn. 31). It is to be noted that the instructions set forth in substance the precise elements which were stated by Mr. Justice Burton, with whom Mr. Justice Harlan and Mr. Justice Frankfurter joined, in his concurring opinion in *Jencks* v. *United States*, No. 23, Oct. Term, 1956, decided June 3, 1957 (slip opinion, p. 8), to be the essential constituents of the concept of "affiliation." After charging that affiliation means "a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party" (R. 1138-P), the trial court said that affiliation is shown by "'a close working alliance or association between [a person] and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for

an indefinite future period upon a fairly permanent basis" (*ibid.*).[4] In expressing the view that the affiliation instruction in *Jencks* was defective, Mr. Justice Burton said that "[i]t [the instruction] did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.'" The instruction given in the instant case thus clearly met the requirements of a satisfactory definition as set forth by Justices Burton, Harlan, and Frankfurter, in *Jencks*.

In any event, the purpose of Rule 30, F.R. Crim. P. (see *supra*, pp. 3-4) is to have counsel point out his objections to the instructions in a specific form so as to give the court the opportunity to modify or amend them in the light of well-taken objections. Here, the objections which petitioner made at the trial were quite different from those urged now in the petition (*cf.* Pet. 25-27 with R. 1148-1149). Consequently, the objections now urged are not properly presented because the trial court had no opportunity to consider them.[5]

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[4] For other parts of the court's charge on "affiliation," see Pet. App. 40-41, fn. 8.

[5] Petitioner did not express at the trial the concern for elaboration of the instruction on "affiliation" which he now expresses in his petition for certiorari (Pet. 26-27). At the trial, when the jury requested a dictionary, shortly following the submission of the case, for further enlightenment as to the meaning of "member" and "affiliation" (R. 1168,

(*b*). Equally without merit is petitioner's contention (Pet. 19-25) that his conviction is based, in substance, on nothing more than his activity in the Communist Party prior to the date of the affidavit and that the admission of this evidence had the effect of giving to the word "affiliation," as applied in this case, a "wider and different sense" than this Court gave it in the *Douds* case, *supra*, 339 U.S. 382 (Pet. 18-19).

The Government's evidence (*supra*, pp. 5-8) clearly showed petitioner's close ties with the Communist Party and adherence to its doctrines both before and after the execution of the affidavit. This evidence was admissible to show petitioner's state of

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1171), the judge, while expressing the view that a dictionary would not be helpful to the jury, indicated that he was not opposed to complying with the jury's request if "you gentlemen [*i.e.*, the attorneys for the accused and the Government] feel it would be helpful" (R. 1168). Counsel for petitioner made no request that a dictionary be supplied the jury, but on the contrary apparently acquiesced in the judge's "disposition not to send * * * the dictionary" in to them (R. 1169). The judge, accordingly, apprised the jury that, while he would gladly have supplied them with a dictionary, if he thought there was "anything in [it] that * * * would help" them in their deliberations, their proper course was to ask him for further instructions if they found, after considering his original instructions (a copy of which had previously been supplied the jury (R. 1157-58, 1165-66)), that they needed any further definition of terms (R. 1171). The jury thereupon again retired to consider a verdict, and made no further request for instructions. Counsel for petitioner at no time objected to the procedure which the judge thus adopted.

mind when he executed the affidavit and was cumulative proof of his affiliation with the Communist Party. It was proper that these relevant acts and statements—"the outward manifestations of state of mind" (*Douds*, 339 U.S. at 411-412)—should be considered by the jury in determining petitioner's guilt. The post-affidavit statements (*supra*, p. 8) indicated that petitioner still considered himself a member of the Party; these statements must be considered with his cessation of direct Party activity and the Party policy, of which he was fully aware (*supra*, pp. 6-7), of ostensible withdrawal from the Party by union officer-members who should find it tactically advisable to sign § 9(h) affidavits (in the meantime maintaining "close alliance" with the Party (R. 504)). Together, all this evidence fully warranted, we submit, the inference which the jury drew—that petitioner, contrary to his oath, was affiliated with the Communist Party at the time of his affidavit.[*]

Dealing with a contention similar to petitioner's, the Court of Appeals for the Sixth Circuit in *Hupman* v. *United States*, 219 F. 2d 243, certiorari denied, 349 U.S. 953, said (at page 248):

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[*] The jury's acquittal of petitioner on the membership count and its finding of guilt on the affiliation count presumably were based on a finding and belief that a union officer-Party member who filed a § 9(h) affidavit pursuant to such policy of the Party continued to be at least "affiliated" with the Party if not technically a member, at least where the signer of the affidavit, as here, professed himself to be, after the filing of the affidavit, "still a Communist and proud of it" (R. 697).

> The appellant's argument seems to be that unless there is direct proof that appellant was a Communist on the very day the affidavit was signed or filed, the proof of violation fails. This impresses us as an absurdity, especially when the evidence shows that the appellant's instructions were to avoid external indications of Communist membership while still maintaining connection with and giving support to the Party.

(*c*). Also lacking in substance is petitioner's contention that the word "affiliated", as used in the affidavit (Pet. 18-19) and in the indictment (Pet. 20), is too vague to warrant a conviction for false denial of affiliation. *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 412-413. The fact that "no honest, untainted interpretation" of the term is punishable under 18 U.S.C. 1001, as this Court there pointed out, "removes the possibility of constitutional infirmity" (339 U.S. at 413).

(*d*). Petitioner further urges that "[t]he alleged 1951 admissions" which he made (see *supra*, p. 8) are of "no avail to bolster this incredible case" because it was "improbable" that he would have made them and because they "lack the necessary corroboration" (Pet. 24).

So far as regards the claim (see Pet. 24, 10-11, fns. 13, 14) that it was "improbable" that petitioner made these admissions, this was, of course, an issue of credibility for the jury to determine. *Glasser* v. *United States*, 315 U.S. 60, 77. It may be noted that the trial judge, in his instructions, carefully pointed

out the possible effect of interest and hostility on the part of witnesses on their testimony (R. 1138-F, 1138-H—1138-I). With respect to petitioner's observation that witness Whitelaw failed to relate the fact of petitioner's admission in the course of prior testimony by Whitelaw at a National Labor Relations Board hearing on April 15, 1952 (Pet. 10-11, fn. 13), it should be said that the Government, on redirect examination of this witness, established that the Labor Board attorney had instructed him "to leave out the Communist issue" (R. 582) in his testimony before the Labor Board because it was irrelevant. Government Exhibit 18, dated August 6, 1951, proves conclusively that Whitelaw did relate petitioner's admission to the Federal Bureau of Investigation prior to the Labor Board hearing (R. 584-585).

With regard to the argument that petitioner's 1951 admissions "lack the necessary corroboration" (Pet. 24), petitioner's reliance upon *Opper* v. *United States*, 348 U.S. 84, and *Smith* v. *United States*, 348 U.S. 147, is clearly misplaced. In the first place, those cases deal with the question of the quantum of evidence, corroborative of an extrajudicial admission or confession *to law-enforcement authorities*, required to sustain a conviction. The requirement that there be some such corroborative evidence—and very little is required—is founded on the law's concern lest a conviction be based solely on an untrue admission or confession, induced by fear, coercion, or hope of

leniency. 3 Wigmore, *Evidence* (3d ed., 1940), §§ 821, 822; 7 Wigmore, *Evidence* (3d ed., 1940), § 2071; 2 Wharton, *Criminal Evidence* (12th ed., 1955), §§393-394, 372-383; *Bram* v. *United States*, 168 U.S. 532, 562-564; *Wilson* v. *United States*, 162 U.S. 613, 622-623; *Opper* v. *United States*, *supra*, *at* 89-90; *Smith* v. *United States*, *supra*, at 153, 155. Here, the "admissions" are of an entirely different sort, having been made prior to arrest and to private persons other than law-enforcement authorities. The rule requiring corroboration of admissions or confessions is inapplicable.

Even if it were applicable, however, there was adequate corroboration, consisting of the evidence of petitioner's active membership and leadership in the Communist Party from 1937 to 1947, the Party policy *vis-à-vis* compliance with the Taft-Hartley Act (adopted in 1947 and known to petitioner), and petitioner's activities in 1948 and 1949 indicating close alliance with the Party (*supra*, pp. 5-7). Furthermore, there were two separate and distinct admissions, made on different occasions to different witnesses, one of the admissions having been testified to by two different witnesses (*supra*, p. 8). The admissions were thus *mutually* corroborative. This fact in itself removes any real concern that the admissions may have been untrue—which, as we have seen, is the consideration on which the rule requiring some corroboration is based.

2. Petitioner contends that a portion of the testimony was inadmissible as "hearsay" (Pet. 28-32).

The challenged evidence was as follows: William Foard, a former member of the Communist Party, testified that he attended a San Francisco County meeting of the Party during the summer of 1947 and that petitioner was among those present and participating (R. 497). The meeting was for the purpose of considering the attitude of the Party toward the recently-enacted Taft-Hartley Act (R. 498). During the meeting, a discussion arose as to whether Party members who were union officials (as petitioner then was) should risk signing the "non-Communist affidavit" (R. 500). Leonard Kaplan, the Trade Union Director of the Party, who was presiding, declared that the National and State Committees of the Party had decided that Party members were to "boycott" the law, since they could "live without" it, unless other labor unions (including Harry Lundeberg's Sailors Union) menaced the "progressive" unions by membership raids or jurisdictional disputes; that, if that happened, they would have to "comply" with the Act to save their organizations; that this was to be accomplished through the device of "resign[ing]" from the Party "in name only"; and that all such officials submitting such nominal resignations were in the meantime to remain in "touch" and "close alliance with" the Party, and to be informed of all decisions and policies of the Party (R. 504-506).

In the course of this discussion, petitioner stated that he was "faced with a terrific struggle on the

waterfront" with Lundeberg's union, and that, while he saw no "present need for complying," it might prove necessary to file an affidavit at a later date (R. 503).

This evidence was clearly competent. Kaplan's statements were admissible for the purpose of making petitioner's own statements—the admissibility of which is, of course, not challenged—understandable. It is only in the context of the meeting and of Kaplan's statements that petitioner's statements have any meaning. It is well settled that surrounding circumstances, whether oral declarations or other facts, which tend to illuminate the principal fact in such a way as to make the whole one transaction and place the principal fact in its true light, are admissible on the theory of "testimonial completeness," or, as it is sometimes phrased, as part of the *res gestae*. *Beaver* v. *Taylor*, 68 U.S. 637; *Bruce* v. *United States*, 73 F. 2d 972 (C.A. 8); *Stockman* v. *United States*, 8 F. 2d 211 (C.A. 9).

3. Petitioner next contends (Pet. 33-35) that, notwithstanding that the instant prosecution was brought, as it was required to be, under the "false statements" statute (18 U.S.C. 1001), the two-witness perjury rule should nevertheless have been applied because the allegedly false statements were under oath. This is an afterthought by petitioner, since the record at the trial does not reveal any request for the two-witness perjury instruction by petitioner or any objection to the trial court's omis-

sion of such instruction. See Rule 30, F.R. Crim. P. (*supra*, pp. 3-4). Indeed, the argument is being advanced by petitioner for the first time in this Court; it was not raised in the Court of Appeals.

In any event, the Government submits that the two-witness perjury rule is inapplicable to this kind of proceeding. As petitioner points out (Pet. 33), this question was involved in *Gold* v. *United States*, 237 F. 2d 764 (C.A.D.C.), reversed on other grounds, 352 U.S. 985. For the reasons for the Government's position, the Court is respectfully referred to pp. 84-88 of our brief on the merits in that case, No. 137, Oct. Term, 1956.

4. Just before the jury rendered its verdict, the trial court ordered that, after the verdict, no person was to communicate with the jurors concerning their deliberations, without leave of the court (R. 1180-1181). On the basis of a newspaper story published several days following the return of the verdict—in which two of the jurors were alleged to have said, "A higher court [will] have to make the final determination of the meaning of 'affiliation' as the word applied to Bryson"—petitioner moved the court to be relieved of the order forbidding communication with the jury in order that he might, by questioning the jurors, ascertain whether "any extraneous or illegal considerations had entered into the jury's deliberations" (Pet. 36; R. 1192). Following argument (R. 1191-1219), the court declined to grant the requested permission (R. 1219). Petitioner's

contention (Pet. 36-38) that this was error is, we submit, without any merit.

It is well settled that "ordinarily jurors in the United States Courts will not be heard to give testimony, whether oral or by affidavit, for the purpose of impeaching the verdict returned where the facts sought to be shown are such that they essentially inhere in the verdict." *Young* v. *United States*, 163 F. 2d 187, 188 (C.A. 10), certiorari denied, 332 U.S. 770.[7] This Court indicated its accord with this policy in *Stein* v. *New York*, 346 U.S. 156, 178-179:

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. "If evidence thus secured could be thus used, the result would be to make what

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[7] See also *Clark* v. *United States*, 289 U.S. 1, 18; *United States* v. *Furlong*, 191 F. 2d 1, 4-5 (C.A. 7), certiorari denied, 343 U.S. 950; *United States* v. *Hohn*, 198 F. 2d 931, 938-939 (C.A. 3), certiorari denied, 344 U.S. 913; *Rakes* v. *United States*, 169 F. 2d 739, 745-746 (C.A. 4), certiorari denied, 335 U.S. 826; *United States* v. *Handy*, 203 F. 2d 407, 419 (C.A. 3), certiorari denied *sub nom. Maroney* v. *United States*, 346 U.S. 865; *Northern Pacific Railway* v. *Mely*, 219 F. 2d 199, 201-202 (C.A. 9); and the numerous authorities cited in *Young*, *supra*.

was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, *supra*, at 267-268.

But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues, and departure from instruction is a risk inseparable from jury secrecy and independence. The uncertainty, while the cause of concern and dissatisfaction in the literature of the profession, does not render the customary jury practice unconstitutional.[8]

At the same time that it made the order from which petitioner sought to be relieved, the court admonished the jury that, if at any time any of them felt that something should be said about the jury's deliberations or any incidents connected therewith, they should feel free to communicate with the court and the court would hear them (R. 1181). The order itself enjoined the parties from communicating with the jury "without permission of the Court". (*ibid.*). In denying petitioner permission to communicate with the jury, the trial court said, " * * * if there were any reliable hint, any showing of substance beyond just a mere idle curiosity to justify interview of the jury to ascertain whether they func-

[8] Questioning jurors about their deliberations to impeach their verdict has been frequently criticized. See American Bar Association Canon of Professional Ethics, No. 23; American Bar Association Committee on Professional Ethics, opinion 109, issued March 10, 1934 (R. 1197).

tioned as a jury should function, the Court would certainly entertain it. There is no showing here of any reason to interview the jury at this late day. * * *" (R. 1218).

We submit, furthermore, that the statements attributed to two of the jurors by the newspaper article fail to show that they were uncertain as to the meaning of "affiliation." These were at most equivocal statements which could have indicated a desire on the part of these two jurors to have an appellate court determine whether or not they were correct in their determination. In any event, "[j]urors cannot be heard to testify that while the substance of the verdict returned into court was understood, it was predicated upon a mistake of the testimony, a misrepresentation of the law, unsound reasons, or improper motives." *Young* v. *United States*, *supra*, 163 F. 2d at 189 (C.A. 10), certiorari denied, 332 U.S. 770. The jury was individually polled and each juror agreed that the verdict returned was his (R. 1182-1183), and no juror, at any time, notwithstanding the court's explicit invitation to the jurors to do so if they desired, evidenced a wish to report to the court anything in the nature of an irregularity or otherwise in connection with the jury's deliberations. In these circumstances, the court properly refused, in the exercise of a sound discretion, to permit petitioner or others on his behalf to interrogate individual jurors as to what went on in the privacy of the jury room, or as to how the jurors arrived at the verdict

they reached, or otherwise to subject them to questioning.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1957

## No. 171

HUGH BRYSON,
*Petitioner,*
vs.
UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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# In the Supreme Court
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OCTOBER TERM, 1957

No. 171

HUGH BRYSON,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

Hugh Bryson respectfully petitions for a rehearing of the Order of October 14, 1957, denying his petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit to review its judgment in this case.

### STATEMENT.

On June 6, 1957, there was filed in this Court a petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. The questions presented by said petition

were in substance and effect (1) whether section 9(h) of the Taft-Hartley law (29 U.S.C.A. 159[h]) was unconstitutionally applied to petitioner; (2) whether the term "affiliated" as used therein was applied to petitioner in a manner contrary to this Court's decision in *American Communications Association v. Douds*, 339 U.S. 382; (3) whether, in the light of this Court's decision in *Bridges v. Wixon*, 326 U.S. 135, the jury was correctly instructed on the meaning of the term "affiliation"; (4) whether petitioner's conviction was supported by substantial evidence; and (5) whether errors were made in other respects which prevented petitioner from having a fair trial.

On October 14, 1957, this Court denied the petition.

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## JURISDICTION OF THIS COURT.

This petition for rehearing is filed pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States.

The grounds upon which it is based are that there are substantial grounds available to petitioner for granting the petition which were not previously presented, and that there exist intervening circumstances of a substantial or controlling effect.

## REASONS FOR GRANTING THE REHEARING AND THE PETITION.

### 1. PETITIONER IS INNOCENT OF THE ALLEGED CRIME OF WHICH HE WAS CONVICTED.

Petitioner was convicted of having falsely stated in April of 1951 that he was not then "affiliated" with the Communist Party. The conviction, which the Court of Appeals affirmed, was based upon evidence that petitioner had been a "member" of the Communist Party from 1937 to 1947, that the party had adopted a policy of having its members "resign . . . in name only" if necessary to execute the affidavits, and that petitioner had made extra-judicial admissions in July of 1954 that he was still a Communist.

While this might conceivably have made out a case that petitioner was a "member" in 1951, the jury rejected this evidence and returned a not guilty verdict on the membership count. Whether this acquittal must now be taken as a jury finding that the evidence proffered by the Government was not worthy of belief is irrelevant here, for in any case the evidence relating to membership—and there was no other evidence—cannot make out the case on affiliation. Thus the conviction upon the affiliation count is devoid of evidentiary support in the record and petitioner is patently innocent of the count on which the conviction was returned. Why a jury would have returned what was plainly a compromise verdict in a case involving "communism" may be a matter of some speculation; but the hard fact is that on this record there was no proof of the charge made in the second count.

The record shows that the Government tried its case solely upon the theory of membership, and that it offered

no evidence directed to the affiliation count as such. This much is true whether affiliation be now defined, as this Court had defined it in *Bridges v. Wixon*, 326 U.S. 135, or as the trial judge quite differently defined it in his charge. This situation is analogous to the one presented to this Court in *Cole v. Arkansas*, 333 U.S. 196. In reversing a conviction obtained under one section of a statute although the evidence showed a violation of a different section, this Court said:

> "It is as much a violation of due process to send an accused to prison following conviction on a charge *on which he was never tried* as it would be to convict him on a charge that was never made" (333 U.S. at 201).

The record shows that petitioner was "never tried" upon the affiliation count. The Government's case throughout was based on the membership count as its own statement of facts in its opposition to the petition makes this clear.[1]

Having obtained a conviction on the affiliation count, the Government naturally seeks to sustain it. But the record is that the case in the District Court consisted of

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[1]This was quite explicitly recognized in the court below in its consideration of the sufficiency of the evidence to sustain the conviction on the *affiliation* count:

> "Can a person who is proved to have been a member of the Communist Party successfully claim that he was not affiliated with it? To the layman this suggestion would be absurd. The law does not require a different result. The *Wixon* case stated that the term 'affiliation' imports less than membership but more than sympathy. Accordingly, proof of membership would establish affiliation *a fortiori*". (238 F.2d 657, at 663).

The difficulty with this reasoning for this case is that petitioner was not "proved to have been a member" at any time near the critical period; to the contrary, he was acquitted of that charge.

evidence relevant only to membership and not to affiliation. Having tried petitioner to all intents and purposes on the first count of the indictment, the Government should not now, after a jury acquittal on that count, be permitted to imprison him on the erroneous claim that it proved a violation of the second count. Proof of the charge on which he was acquitted should not be permitted to sustain the charge on which no proof was offered. Such a situation presents not only a patent denial of due process, but actually demonstrates the innocence of petitioner of the charge of which he was convicted.

It is not to be denied that the guarantee of due process in criminal cases embraces *procedural* fairness, as this Court's recent decisions so properly remind us. But this is not to suggest that *substantive* fairness is outside the scope of constitutional protection. If, on the record made, the defendant is not shown to be guilty according to prevailing standards of proof, he should be ordered acquitted, however attentive the trial court may have been to enforce procedural safeguards. For it is the purpose of criminal proceedings—and their *only* purpose—to convict the guilty, not the innocent. This Court itself has demonstrated that its concern is not merely with insuring the appearance of justice, but also to free those not shown guilty, however "fair" the trial has been. Cf. *Yates v. United States*, 354 U.S. 298.

The petition for the writ included, among the questions presented, that of whether the conviction was supported by proper and competent evidence. But the innocence of petitioner in the terms now urged was not

argued because the heavy reliance of the Government upon pre-affidavit evidence, its failure to prove that the "affiliation" was for an unlawful purpose, and the failure of the trial judge to instruct as required by *Bridges v. Wixon, supra*, appeared to be questions so clearly embraced within the scope of the writs theretofore granted in *Gold v. United States*, 352 U.S. 985, and *Jencks v. United States*, 353 U.S. 657, and left unresolved by those cases, as to lead to the pardonably confident belief that certiorari would be granted here. Petitioner's counsel could not believe that in his case this Court would refuse to review questions covered by the writs already issued in *Gold* and *Jencks:* questions, moreover, which the Government itself had urged this Court to decide, questions upon which the Court was "sorely divided", and questions, the resolution of which was said to be required in the interests of sound judicial administration.

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**2. SINCE THE SUBMISSION OF THE PETITION FOR THE WRIT HERE, TWO OTHER TAFT-HARTLEY OATH CASES HAVE REACHED DECISION IN THE COURTS OF APPEAL.**

In *United States v. Killian*, 246 F.2d 77 (7 Cir.), a conviction for the filing of a false affidavit was reversed on rehearing upon the authority of *Jencks v. United States*, 353 U.S. 657. However, prior to the decision in *Jencks*, the Court of Appeals had affirmed the conviction on an appeal raising questions similar to those here presented. Undoubtedly, but for the circumstance that *Killian* went off on the *Jencks* point, that case would now be pending here on certiorari presenting these very questions.

In *Travis v. United States*, 247 F.2d 130 (10 Cir.), a conviction for the filing of a false affidavit was reversed on the ground that, contrary to the opinion in *Gruenwald v. United States*, 353 U.S. 391, prejudicial error had been committed in the cross-examination of defense character witnesses. However, the opinion indicates that present also in the case were questions relating to the adequacy of instructions on membership and affiliation, and to the validity of the indictment. Again, but for the fact that the case went off upon another ground, it is clear that the *Travis* case would now be pending here on the questions left unresolved in *Gold* and *Jencks*, and presented here.

These decisions underline both the important and recurrent nature of the questions presented by the petition here, and emphasize the need for their early determination. Certainly it cannot be the law that only those accused of violating Section 1001 who are "fortunate" enough to have the trial judge deny their requests to inspect F.B.I. reports or permit inquiry into matters foreclosed by the Fifth Amendment, are entitled to have their convictions reviewed in this Court. Obviously there are other questions at least equally important; and as the *Killian* and *Travis* cases show, they are, and are bound to be, recurrent. The lower federal courts presumably have learned the lessons of *Jencks* and *Gruenwald*; but that does not mean that there are no important questions left in these Taft-Hartley oath cases.

**3. SINCE THE SUBMISSION OF THE PETITION FOR THE WRIT HERE, A CASE HAS BEEN DECIDED IN THE TENTH CIRCUIT WHICH CONFLICTS WITH THE DECISION BELOW ON THE QUESTION OF RELIANCE UPON LONG PAST ACTIVITIES TO CORROBORATE EXTRA-JUDICIAL ADMISSIONS.**

In *Kelly v. United States*, 246 F.2d 864 (10 Cir.), the Court of Appeals, relying upon *Opper v. United States*, 348 U.S. 84, and *Smith v. United States*, 348 U.S. 147, reversed a judgment of conviction on the ground that the extra-judicial admission was not adequately corroborated. The issue in the case was whether the defendant had transported a firearm in interstate commerce. His extra-judicial admission was that he had done so. The "independent evidence" tending to establish the trustworthiness of that admission was that the defendant, who was arrested in Colorado in 1956, had been in Missouri in 1951 and for some time thereafter. The Court of Appeals held that this evidence was not sufficient to corroborate the extra-judicial admission.

> "We do not believe that Kelly's presence in Missouri some six years before the alleged offense, nor his presence in an automobile bearing Missouri license plates, considered independently, lends any substantial support to the Government's case" (246 F.2d, at 866).

This decision squarely conflicts with the holding below, that evidence of petitioner's Communist Party membership four years before the commission of the alleged crime, was sufficient corroboration of his extra-judicial admission. Clearly there is no difference in principle between the six year gap in the *Kelly* case and the four year gap in the case at bar. If the ancient evidence was not ade-

quate corroboration in the one case, it cannot logically be in the other.

On this point alone, and even without the necessity of considering the constitutionality of the Taft-Hartley law as here applied, or the correct meaning of the term "affiliation", or any of the other questions left open in *Gold* and *Jencks*, and presented by the petition here, this petition for rehearing should be granted. The writ should be issued to resolve the conflict between the case at bar and the *Kelly* case.

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## CONCLUSION.

For the foregoing reasons, in addition to the reasons specified in the petition for the writ, this petition for rehearing should be granted, the writ of certiorari issued, and the judgment below reversed.

Dated, San Francisco, California,
November, 1957.

Respectfully submitted,

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